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THE SIXTH YEAR OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE[1]

By Manley O. Hudson

Bemis Professor of International Law, Harvard Law School

The sixth year of the Permanent Court of International Justice has been busy and fruitful. The judges have been kept continuously at The Hague from the beginning of the twelfth (ordinary) session on June 15, 1927, to the end of the session on December 16, 1927. During the year the court has handed down four important orders, four judgments, and one advisory opinion. The following countries have been involved in cases or questions before the court during this period: Belgium, British Empire, China, Danzig, France, Germany, Greece, Italy, Poland, Roumania, Turkey. The extent to which the court has been resorted to in six years is the best proof that it is filling a need in the international life of our time. Whereas, in the course of its first six years, the Supreme Court of the United States handled but twelve cases,[2] the Permanent Court of International Justice has now given eleven judgments and fourteen advisory opinions. Such a record seems to presage a useful rôle for the court in the future. It has now become so embedded in the world's treaty law that it would seem very difficult for the world ever again to be without it. In six years it has made significant contributions to our growing international jurisprudence, some of the most important of which have been made during the last twelve months.

CASE BETWEEN BELGIUM AND CHINA

On November 25, 1926, an application was made to the court on behalf of the Belgian Government to give judgment "that the Government of the Chinese Republic is not entitled unilaterally to denounce" the treaty of November 2, 1865 between the two countries, and pending judgment to indicate "any provisional measures to be taken for the preservation of rights which may subsequently be recognized as belonging to Belgium or her nationals." The treaty of November 2, 1865, was in force for six periods of ten years each, beginning with the exchange of ratifications on October 27, 1866, and the latest of these periods expired on October 27, 1926. Article 46 of the treaty[3] provided for the Belgian Government's giving notice of a desire to

[1] Continuing the series of annual articles on the work of the court, begun in this Journal in January, 1923.

[2] The opinions are reported in 2 Dallas 402, 409, 415 and 419, and in 3 Dallas 1, 6, 17, 19, 42, 54, 121, and 133.

[3] The text is to be found in 56 British and Foreign State Papers, p. 667, and in 2 Maritime Customs, Treaties between China and Foreign States (2d ed.), p. 4.

modify six months before the end of each ten-year interval, but no similar provision was made for modification on the initiative of the Chinese Government. However, on April 16, 1926, the Chinese Government notified the Belgian Government that it regarded the treaty as coming to an end on October 27, 1926. Efforts to conclude a *modus vivendi* failed, a presidential decree in China abrogated the treaty, and legislative measures were enacted in China on that basis. Both Belgium and China were signatories of the "Optional Clause" annexed to the Statute of the Permanent Court of International Justice,[4] and on the basis of that clause the Belgian Government sought the judgment prayed for in its application, whether the Chinese Government was present or absent. Various documents having been filed in support of the Belgian application, on December 17, 1926, the president of the court set the dates for the filing of the documents to constitute the written proceedings, as follows: January 5, 1927, for the applicant's case; March 16, 1927, for the respondent's counter-case; April 6, 1927, for the applicant's reply; June 8, 1927, for the respondent's rejoinder. On December 20, 1926, the president declined to exercise the power conferred by Article 57 of the revised Rules of Court to indicate any provisional measures to be taken, on the basis of the then existing situation. The Belgian case was filed on January 4, 1927, a copy of the report of the Commission on Exterritoriality of 1926 being attached to it. Previously, on December 14, 1926, the Belgian Government had filed with the court a translation of an order addressed on November 6, 1926, by the President of the Republic of China to the Chinese Minister for Foreign Affairs, which indicated that the rights claimed under the treaty had been or were about to be violated in such a way that reparation could not readily be secured.

With this situation before the court, on January 8, 1927, the president exercised the power conferred by Article 57 of the Rules of Court, and made an order[5] indicating *provisionally* that the protection granted by the presidential order of November 6, 1926, should include: (1) as regards nationals, (a) a right of a Belgian who may have lost his passport or have committed an offence to be conducted in safety to the nearest Belgian consulate, (b) effective protection of Belgian missionaries, and in general protection of Belgians against insult or violence, and (c) continued enjoyment of certain privileges of extra-territoriality; (2) as regards property and shipping, protection against any sequestration or seizure not in accordance with international law; (3) as regards judicial safeguards, a right of Belgians and Belgian corporations to have their legal proceedings conducted in the "modern" courts, according to the modern Chinese codes, with a right of appeal and the assistance of advocates. All of these measures, except that as to judicial safeguards, were predicated upon provisions in the treaty of November 2, 1865. The order was done in four copies, one of which was transmitted to the Coun-

[4] The "Optional Clause" is to be found in Publications of the Court, Series D, No. 1, p. 6.

[5] The three orders in this case are to be found in Publications of the Court, Series A, No. 8.

cil of the League of Nations. No provision was made respecting the protection of Chinese nationals in Belgium, as it was noted in the order that "the situation secured by the Treaty to Chinese nationals resident in Belgium has undergone no modification."

On January 17, 1927, the Belgian Government informed the registrar of the court that the two governments had agreed to re-open negotiations for the conclusion of a treaty abrogating that of 1865, and to facilitate these negotiations the court was asked to extend the time allowed for the submission of a counter-case. Thereupon, on January 21, 1927, the president set May 25, 1927, for the filing of the counter-case, June 15, 1927, for the filing of the reply, and August 17, 1927, for the filing of the rejoinder. On February 3, 1927, the court was informed by the agents of the Belgian Government that the two Governments had agreed upon the application of a provisional régime for protecting Belgians in China, which added to that envisaged in the order of January 8, 1927, by providing that "the customs tariff at present applied to other countries will also be applied to merchandise imported into China from Belgium or exported from China to Belgium." In view of this régime, the Belgian Government asked for a revocation of the order of January 8, 1927, in accordance with what it stated to be the desire of the Chinese Government. On February 15, 1927, therefore, the president of the court issued a new order declaring that the order of January 8, 1927, should cease to be operative.

On May 2, 1927, the Belgian Government asked for a further extension of the dates set for the filing of the documents of the written proceedings, it having become apparent that the negotiations in progress would not lead to a definite result before the date then set for the filing of the Chinese counter-case. In this instance, the Belgian Government was acting in fulfillment of a promise made to the Chinese Government when the negotiations were begun. On May 10, 1927, the president extended to June 18, 1927, the time for the filing of the Chinese Government's counter-case, reserving for the court itself a decision on the extension of other dates. On June 14, 1927, the Belgian Government made an additional request for the extension of the various dates. On June 18, 1927, the full court, acting in accordance with Article 33 of the Rules of Court, decided to fix the following dates for the written proceedings: for the counter-case, February 15, 1928; for the reply, April 1, 1928; for the rejoinder, May 15, 1928. There the matter now rests.

Here, then, is an important example of the court's usefulness. In a serious situation between two governments, resort to the court has undoubtedly facilitated direct negotiations, just as in municipal law the filing of an action not infrequently serves as an aid to *rapprochement* between the parties to a dispute. Moreover, the indication of provisional measures, not wholly unlike a temporary injunction, may have contributed a stabilizing influence to the situation. It is to be noted that the published records of the court contain no reference to any action taken by the Chinese Government which

would have constituted a recognition of the court's jurisdiction. Nor do they contain any authorized statement of the position of the Chinese Government.[6] It seems also worthy of note, as possibly establishing a precedent, that when the order of June 18, 1927, was handed down, the full court contained no national judge appointed in accordance with Article 31 of the court's Statute to sit *ad hoc*.

CASE CONCERNING THE FACTORY AT CHORZOW

On February 7, 1927, the German Government filed with the registry of the court an application instituting proceedings against the Polish Government, with respect to reparations claimed to be due from the Polish Government to two German companies on account of the attitude adopted toward these firms when the Polish Government took possession of a nitrate factory at Chorzow on July 3, 1922. This attitude had been declared by the court itself, in a judgment[7] handed down on May 25, 1926, to be not in conformity with the provisions of the Geneva convention concerning Upper Silesia, of May 15, 1922. The submissions of the German Government, as modified in its case filed on March 2, 1927, were that (1) the Polish Government was bound to repair the injury to the two German companies, (2) by paying a compensation to one company of 75,920,000 reichsmarks, plus the present value of certain working capital which had been taken, and by paying a compensation to the other company of 20,179,000 reichsmarks; (3) that until June 30, 1931, no nitrated lime and no nitrate of ammonia should be exported to Germany, to the United States of America, to France or to Italy; (4) that a fixed method of payment of compensation should be determined, with allowance of interest at the rate of six per cent, and that the Polish Government was not entitled to any set-off or deduction.

On April 14, 1927, the Polish Government filed with the registry of the court, a preliminary objection asking the court to declare that it had no jurisdiction, and a preliminary counter-case. The German Government thereupon entered into communication with the Polish Government, seeking a reference to the court by mutual consent, observing that if the court had no jurisdiction under the Geneva convention of May 15, 1922, its jurisdiction could be founded on the German-Polish arbitration treaty initialled at Locarno on October 16, 1925. No agreement having been reached,[8] on June 1,

[6] On November 6, 1926, the Chinese Foreign Office (Waichiao Pu) published a statement and other official documents relative to the negotiations for the termination of the Sino-Belgian Treaty of November 2, 1865, which are reprinted in 11 Chinese Social and Political Science Review (Public Documents Supplement), pp. 1–60.

On November 12, 1927, the Chinese Government formally abrogated the Sino-Spanish treaty of October 10, 1864, and the Waichiao Pu published a statement concerning the abrogation on the same day. See "The Week in China," November 19, 1927. For the text of the Sino-Spanish treaty, see 60 British and Foreign State Papers, p. 474.

[7] Publications of the Court, Series A, No. 7. See this JOURNAL, Vol. 21, pp. 26–29.

[8] The memoranda exchanged were transmitted to the registrar of the court.

1927, the German Government replied to the Polish objection to the court's jurisdiction. At the public sittings of the court on June 22, 24 and 25, 1927, oral statements were made by Messrs. Lobolewski and Politis, agent and counsel of the Polish Government, and Kaufmann, agent of the German Government.

The seizure of the nitrate factory at Chorzow had been the subject of litigation before a civil court at Kattowitz, and before the German-Polish Mixed Arbitral Tribunal at Paris, and it was one of the matters covered in the case brought before the Permanent Court of International Justice by the German application of May 15, 1925. At that time, the Polish Government had contested the jurisdiction of the court, which was established by a judgment given on August 25, 1925.[9] Thereafter, the German Government filed an additional application, later joined to the original, and a judgment on the merits was handed down on May 25, 1926,[10] in which the court held that parts of the Polish law of expropriation of July 14, 1920, were incompatible with provisions of the Geneva convention between Germany and Poland, and that the attitude of the Polish Government toward both of the German companies interested in the Chorzow factory was not in conformity with the provisions of the Geneva convention. But in the latter judgment, the court refused to say what attitude would have been in conformity with such provisons. This judgment was followed by attempts of the two governments to reach an amicable settlement of the claims of the two German companies. The negotiations continued from June 25, 1926, to February 8, 1927, without resulting in agreement. The German Government therefore instituted this proceeding.

In the judgment given on July 26, 1927,[11] the court held that no account was to be taken by the court of declarations, proposals or admissions made by the parties in the course of their unfruitful negotiations, and that the German submissions rested on Article 23 of the Geneva convention of May 15, 1922, which provides (translation):[12]

> (1) Should differences of opinion respecting the construction and application of Articles 6 to 22 arise between the German and Polish Governments, they shall be submitted to the Permanent Court of International Justice.
>
> (2) The jurisdiction of the German-Polish Mixed Arbitral Tribunal derived from the stipulations of the Treaty of Peace of Versailles shall not thereby be prejudiced.

[9] Publications of the Court, Series A, No. 6. See the writer's comment in this JOURNAL, Vol. 21, pp. 15–19.

[10] Publications of the Court, Series A, No. 7. See the writer's comment in this JOURNAL, Vol. 21, pp. 26–29.

[11] See Publications of the Court, Series A, No. 9. Documents in the case are published in Publications of the Court, Series C, No. 13–1.

[12] The text of the Geneva convention was published in 118 British and Foreign State Papers, pp. 365–579. It was previously published at Geneva in pamphlet form.

The Polish objection to the court's jurisdiction was based upon the contentions that Article 23, paragraph 1 of the convention, does not contemplate differences in regard to reparations claimed for violation of those articles, and that otherwise the private parties in interest should have had recourse to the special jurisdictions provided for in the convention itself. Replying to the first of these contentions, the court held that "differences relating to reparations, which may be due by reason of failure to apply a convention, are differences relating to its application." Article 23, paragraph 1, is a *clause compromissoire* which is not to be restrictively interpreted as excluding questions of pecuniary reparation. The difference between the nature of *clauses compromissoires* and the object of the classification of disputes in general arbitration agreements, such as the Covenant of the League of Nations, makes it impossible to draw a conclusion from the terminology of the one class of provisions in respect of the other. "The decision whether there has been a breach of an engagement involves no doubt a more important jurisdiction than a decision as to the nature or extent of reparation due for a breach of an international engagement" already established to exist. In a previous judgment,[13] the court had observed that while application is a wider term than execution, "execution . . . is a form of application." Article 23 is to be interpreted with reference to the function to be attributed to it. If the court were confined to recording that provisions of the convention were being improperly applied, without being able to protect the treaty rights affected, the natural object of the article would not be served.

As to the second contention of the Polish Government, that the German companies should have had recourse to other jurisdictions established by the Geneva convention, it was argued that one or the other or both the Upper Silesian Arbitral Tribunal and the German-Polish Arbitral Tribunal had jurisdiction. It was not argued that the Polish courts had jurisdiction. The court pointed out that in its sixth judgment, it had disposed of a contention that the two special tribunals had jurisdiction; but since only a declaratory judgment as distinct from indemnity had been sought in that case, the question called for fresh examination. The Polish Government relied on Article 5 of the Geneva convention, which provides (translation):

> The question whether and to what extent an indemnity for the suppression or diminution of vested rights must be paid by the State, will be directly decided by the Arbitral Tribunal upon the complaint of the interested Party.

But it was held that this referred to a different part of the convention (Head II and not Head III). The provisions of the Geneva convention relating to the German-Polish Mixed Tribunal do not expressly contemplate acts of the kind for which the German Government claims an indemnity on behalf of the dispossessed companies, for these acts constitute special measures which fall

[13] In Judgment No. 5, in the case of the Mavrommatis Jerusalem Concessions. Publications of the Court, Series A, No. 5, p. 47.

outside the normal operation of the relevant articles of the Geneva convention. Moreover, the Polish Government had failed to comply with the procedure prescribed by the Geneva convention, and therefore "cannot in this particular case require the interested Parties to look for redress of the injury sustained by them to the tribunals which might have been open to them if the Convention had been applied."

It was repeatedly argued that in case of doubt the court should decline jurisdiction. To this it was answered that as the court's jurisdiction is always limited, it would be exercised only when "the force of the arguments militating in favor of it is preponderant." The court feels itself bound to find an expressed intention of the parties to confer jurisdiction. In this case, the intention was convincingly demonstrated. Hence, the court affirmed its jurisdiction and reserved the suit for judgment on the merits. The questions raised as to enjoining Poland's exportation and allowing Poland a set-off, belong to the merits of the suit. Poland's plea to the jurisdiction was therefore dismissed, the suit was reserved for judgment on the merits, and the president was instructed to fix the times for the deposit of the counter-case, reply and rejoinder.

Three of thirteen judges dissented from these conclusions, and M. Ehrlich, the Polish national judge, delivered a separate opinion in which he found that reparation was due to the German companies, that within the meaning of Article 23 no "divergence of opinion" existed, and therefore that the court had no jurisdiction. Moreover, he was of opinion that jurisdiction to entertain the first of the German submissions did not entail jurisdiction to entertain the second, third and fourth of them. "In international law jurisdiction to decide, in principle, that a violation of an international engagement has taken place and that, consequently, reparation is due, is distinct from jurisdiction to determine the nature and extent of reparation in general and the amount of a pecuniary indemnity in particular." Nor had the parties indicated any intention to confer such larger jurisdiction. Interpretation and application are not broad enough terms to cover questions relating to the nature and extent of reparation due. Light as to the intention of the parties was to be found in a *contemporanea expositio* to be gathered from their acts which preceded, accompanied and followed the making of the Geneva convention; and M. Ehrlich referred to the failure of the two governments to include in the Geneva convention the more explicit language about compensation to be found in an almost contemporary convention concluded by the two governments on April 21, 1921.[14] It appeared to him, also, that the German Government had given indication, in filing the original suit relating to Upper Silesian interests in 1925, that it "was not convinced of the undeniable correctness of the interpretation" established by the court.

This judgment does not mark the end of the long controversy which had previously been the subject of two judgments of the court. It is significant,

[14] 12 League of Nations Treaty Series, p. 26.

however, for its contribution to the cumulating law as to the interpretation of treaties, the meaning of *clauses compromissoires*, and the method of seeking reparation for treaty violations. The German Government has since requested an authoritative interpretation of the judgment.[15]

THE "LOTUS" CASE

No case which has yet arisen before the court has evoked more general interest for its importance to our substantive international law, than that of the *S.S. Lotus*, in which judgment was given on September 7, 1927.[16] All of the eleven judges sat in the case, as well as a Turkish national judge, Feïza Daïm Bey.

On October 12, 1926, at Geneva, representatives of the French and Turkish Republics signed a special agreement for submitting to the court two questions, as follows:

> (1) Has Turkey, contrary to Article 15 of the Convention of Lausanne of July 24, 1923, respecting conditions of residence and business and jurisdiction, acted in conflict with the principles of international law—and if so, what principles—by instituting, following the collision which occurred on August 2, 1926, on the high seas between the French steamer *Lotus* and the Turkish steamer *Boz-Kourt* and upon the arrival of the French steamer at Constantinople—as well as against the captain of the Turkish steamship—joint criminal proceedings in pursuance of Turkish law against M. Demons, officer of the watch on board the *Lotus* at the time of the collision, in consequence of the loss of the *Boz-Kourt* having involved the death of eight Turkish sailors and passengers?
>
> (2) Should the reply be in the affirmative, what pecuniary reparation is due to M. Demons, provided, according to the principles of international law, reparation should be made in similar cases?

This agreement was filed with the registry of the court on January 4, 1927.[17] Turkey is not a signatory of the Protocol of Signature of the Court, and on January 24, 1927, its representative filed the necessary declaration in accordance with Article 35, paragraph 2, of the Rules of Court, accepting the court's jurisdiction for the dispute.[18] Proposals were made by the parties upon which the president of the court fixed March 1, 1927, for the filing by each party of a case, and May 24, 1927, for the filing by each party of a counter-case. The parties expressed a wish that there should be no formal replies. The cases and counter-cases were duly filed, and on August 2, 3, 6, 8, 9, and 10, 1927, oral pleadings, reply and rejoinder were submitted by the agents, M. Basdevant for the French Republic, and Mahmout Essat Bey, Minister of Justice, for the Turkish Republic. The Turkish agents also submitted to the court legal opinions given by Professor Diena of the University

[15] See *post*, p. 21.

[16] Publications of the Court, Series A, No. 10.

[17] The ratifications were not exchanged until December 27, 1926.

[18] See Court Document, Distr. 943, 1927.

of Pavia, Professor Fedozzi of the University of Genoa, and Professor Mercier of the University of Lausanne.

The French case sought judgment that under a convention respecting conditions of residence and business and jurisdiction signed at Lausanne, on July 24, 1923, and under the principles of international law, only the French courts had jurisdiction to entertain criminal proceedings against the officer of the watch of a French ship which had collided on the high seas with a Turkish ship, hence that the Turkish judicial authorities were wrong in taking jurisdiction, and that the Turkish Government should pay to the French Government an indemnity of 6,000 Turkish pounds for the injury suffered by M. Demons. The Turkish case asked judgment in favor of the jurisdiction of the Turkish courts. The French position was more fully elaborated in the French counter-case, as follows: France had rejected at Lausanne a Turkish proposal looking toward giving to Turkish courts jurisdiction of certain crimes committed abroad, and the Lausanne convention should be interpreted to exclude it; by international law, a state cannot take jurisdiction of a crime committed abroad because the victim is its citizen; the principle of freedom of the seas makes acts done on a vessel on the high seas cognizable only by the courts of the state of the vessel's flag, and this is true particularly in collision cases; international law lends no support to a claim to extend jurisdiction on the ground of a "connexity" of offenses. The French agent also placed on record a reservation as to any consequences of the judgment as regards matters not submitted to the court. The Turkish position was similarly elaborated: the Lausanne convention places no restriction on the jurisdiction of Turkish courts except the principles of international law; the provisions of the Turkish Penal Code are borrowed from the Italian Penal Code; a vessel on the high seas forms part of the national territory, and the offense in question was committed on a Turkish vessel; the case involves "connected" offenses for which provisions in the Turkish code of criminal procedure, borrowed from the French code of criminal procedure, prescribe joint prosecution; no principle of international criminal law exists to debar Turkey's exercise of jurisdiction, and therefore no indemnity can be due.

The facts of the case were that on August 2, 1926, a collision occurred between the French mail steamer *Lotus*, bound for Constantinople, and the Turkish collier *Boz-Kourt*. The latter was cut in two and sank, and eight Turkish nationals on board perished. The place of collision, between five and six nautical miles north of Cape Sigri (Mitylene), was admitted to be on the high seas. After aiding in the rescue of ten persons, the *Lotus* arrived at Constantinople on August 3. Thereafter, on August 5, M. Demons, officer of the watch on board the *Lotus*, and Hassan Bey, captain of the *Boz-Kourt* (who had been saved), were arrested, a charge of manslaughter being made by the public prosecutor of Stamboul on the complaint of the families of victims of the collision. The two officers were prosecuted jointly and simultaneously. At a hearing on August 28, the Turkish court overruled M. Dem-

ons' objection to its jurisdiction, and on September 13, he was released on bail. On September 15, the Turkish court gave judgment, sentencing M. Demons to eighty days' imprisonment and a fine of 22 Turkish pounds, the penalty being less severe than that to which Hassan Bey was sentenced. The judgment was appealed from by the public prosecutor, and its execution was suspended. A committee of Turkish jurists which studied the problem of jurisdiction reported that the jurisdiction of the Turkish courts was clear, both according to the laws of Turkey and according to international law. But the protests of the French Government led to negotiations at Geneva, which resulted in the special agreement of October 12, 1926.

The court first defined the effect of the special agreement, which was the measure of its competence. The question for decision was whether the Turkish courts had criminal jurisdiction, the prosecution being for involuntary manslaughter. The proceedings against the two officers were regarded as a single prosecution. Jurisdiction was claimed (perhaps not solely) on the basis of Article 6 of the new Penal Code of Turkey, which provides that any foreigner who commits an offense abroad to the prejudice of Turkey or of a Turkish subject, for which offense Turkish law provides a minimum penalty of one year's imprisonment, shall be punished in accordance with the Turkish Penal Code, provided he is arrested in Turkey. But the question before the court was more general than the application of any single part of Turkish law—do the principles of international law forbid Turkey's instituting criminal proceedings against M. Demons under Turkish law?

The court then analyzed Article 15 of the Lausanne convention of July 24, 1923, which provides:[19]

> Subject to the provisions of Article 16 [which relates to personal status], all questions of jurisdiction shall as between Turkey and the other contracting Powers, be decided in accordance with the principles of international law.

It was the French contention that the expression "principles of international law" as used in this convention should be interpreted in the light of the article's evolution. The court held "that there is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself," and that the expression here could only mean "international law as it is applied between all nations belonging to the community of states." Such interpretation is re-enforced by the facts that the parties to the convention had expressed a desire to effect a settlement in accordance "with modern international law," and that the convention effected an abolition of the capitulations.

The two parties divided on a question of principle. The French contention was that some "title to jurisdiction recognized by international law"

[19] 28 League of Nations Treaty Series, pp. 151, 163.

should be pointed out in favor of Turkey; the Turkish contention was that Article 15 of the Lausanne convention allowed Turkey to take jurisdiction unless some principle of international law could be shown to the contrary. Acceptance of this latter view led the court to make the following pronouncement on the "nature and existing conditions of international law:"[20]

> International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.

Nor does criminal differ from civil jurisdiction in this respect. Many states take cognizance of offenses committed abroad; "the territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty." The form of the question requires the court to say whether any existing rule of international law limits the freedom of states to extend the criminal jurisdiction of their courts to a situation uniting the circumstances of the present case.

No rule of international law forbids Turkey to take into consideration the fact that the offense produced its effects on a Turkish vessel "and consequently in a place assimilated to Turkish territory in which the application of Turkish criminal law cannot be challenged." Hence, the prosecution here may be "justified from the point of view of the so-called territorial principle." In reply to a suggestion that the offense of manslaughter cannot be localized at the spot where the mortal effect is felt, the court pointed out that "effect is a factor of outstanding importance in offenses such as manslaughter." To the French contention that "the state whose flag is flown has exclusive jurisdiction over everything which occurs on board a merchant ship on the high seas," it was answered that "a ship is placed in the same position as national territory." No rule of customary international law was shown which establishes the exclusive jurisdiction of the flag state. In the case of the *Costa Rica Packet*,[21] which was cited, the *prauw* on which the alleged depredations occurred was adrift without a flag or crew. Nor does exclusive jurisdiction prevail specially in collision cases; decisions of international tribunals are lacking, and the decisions of municipal courts are at variance. The French agent cited the *Ortigia-Oncle Joseph* case[22] before a court at Aix, and the *Franconia* case[23] before the British Court for Crown Cases Reserved; but against these were cited the *Ortigia-Oncle Joseph* case[24] before

[20] Publications of the Court, Series A, No. 10, p. 18.

[21] 5 Moore, International Arbitrations, p. 4948. A good summary of this case has been published in 1 Pitt Cobbett, Cases on International Law (4th ed.), p. 279.

[22] (1885) 12 *Journal du Droit International Privé* (Clunet), p. 286.

[23] Regina *v.* Keyn (1876), L. R. 2 Ex. Div. 63.

[24] (1882) 12 *Journal du Droit International Privé* (Clunet), p. 287.

the Italian courts, and the *Ekbatana-West Hinder* case[25] before a Belgian court. The court observed that "as municipal jurisprudence is thus divided, it is hardly possible to see in it an indication of the existence of the restrictive rule of international law" for which the French agent contended. Moreover, the court was influenced by the fact that it does not appear that states concerned have objected to criminal proceedings in collision cases before the courts of a country other than that of the flag. As to the *Franconia* case, that view of the localization of an offense has been abandoned in two more recent English cases.[26] The conclusion was clear that "there is no rule of international law in regard to collision cases to the effect that criminal proceedings are exclusively within the jurisdiction of the state whose flag is flown."[27] It is a case of concurrent jurisdiction.

Nor did the court confine itself to a consideration of the arguments put forward. It "included in its researches all precedents, teachings and facts to which it had access." On this basis, it gave a negative answer to the first question before it, and hence it became unnecessary to answer the second question. But the twelve judges being equally divided, this judgment was reached by the president's casting vote.[28] Judges Loder, Weiss, Finlay, Nyholm and Altamira delivered separate dissenting opinions, and Judge Moore, dissenting only on the connection of the criminal proceedings with Article 6 of the Turkish Penal Code, also delivered a dissenting opinion.

Judge Loder thought that while a state may punish its own nationals for crimes committed abroad, its criminal law cannot extend to offenses committed by a foreigner in foreign territory. He insisted on localizing the offense in this case, and distinguished it from cases where an effect is intentionally produced in a territory other than that of the actor's presence. He denied the existence of any "connexity." Judge Weiss thought that the Turkish contention rested on a search for sources of international law where they do not exist. An "accumulation of opinions" and a "sum total of judgments" are only methods of discovering, but the real source of international law is the *consensus omnium*. He referred to correspondence in the Cutting Case,[29] and to the treaty of Montevideo of January 23, 1889, as supporting the exclusive jurisdiction of the territorial state. He localized the offense at the place where the actor was at the time, and he found "connexity" to be important in municipal law only. Both the principle of territorial sovereignty and that of the freedom of the seas led him to a conclusion different from that of the majority. Lord Finlay did not take the court's view of

[25] (1914) 41 *Journal du Droit International Privé* (Clunet), p. 1327.

[26] The court cited Regina *v.* Nillins (1884), 53 L. J. 157; and Rex *v.* Godfrey [1923], 1 K. B. 24. Cf. *The Fagernes* [1927], Probate, 311.

[27] Publications of the Court, Series A, No. 10, p. 30.

[28] In accordance with Article 55 of the court's statute.

[29] U. S. Foreign Relations, 1886, pp. 691 *ff*. See also, the report of John Bassett Moore on Extraterritorial Crime and the Cutting Case, U. S. Foreign Relations, 1887, pp. 757–844; Scott, Cases on International Law (1922), pp. 387 *ff*.

the question before it. He thought that "the *compromis* cannot, with any fairness, be read so as to require France to produce some definite rule forbidding what was done by Turkey;" instead, "the question is whether the principles of international law authorize what Turkey did." He thought that "jurisdiction over crimes committed on a ship at sea is not of a territorial nature," but depends on the law which is applied to ships "for convenience and by common consent." That law gave exclusive jurisdiction to the French courts in this case, and Turkey was limited in her protection of her nationals to bringing pressure to have M. Demons brought to justice before French courts. Judge Nyholm thought the present case one of "actual infringement of the principle of territoriality." He pointed out that Turkey had failed to produce evidence "calculated to establish precisely where death occurred." He could find no established exception to the territorial principle which would provide legal sanction for Turkey's exercise of jurisdiction. "Turkey's action in this case is not at the present time justified in law, on the other hand it cannot be regarded as aggressive from a moral point of view."

Judge Moore concurred in the main conclusion of the court in an opinion which for clarity of statement of fundamental principles and for analysis of decided cases is unsurpassed in all of the court's jurisprudence. His discussion of the law of piracy deserves to go down as a classic. Judge Moore repudiated the distinction between murder and manslaughter in connection with jurisdictional questions, as "obsolete and obviously fallacious." He thought that the *Franconia* case did not represent English law, and that the case of the *Costa Rica Packet* was valueless as support of the claim to exclusive jurisdiction. He dissented from the view that the question of the international validity of Article 6 of the Turkish Penal Code was not before the court under the terms of the *compromis*. Without disputing "the right of a State to subject its citizens abroad to the operation of its own penal laws," he denied that a state "may punish foreigners for alleged violations, even in their own country, of laws to which they were not subject." Therefore, the criminal proceedings in this case, so far as they rested on Article 6 of the Turkish Penal Code, were in conflict with the principles, (1) that a state's jurisdiction over the national territory is exclusive, (2) that foreigners in a country are subject to the local law, and (3) that a state cannot rightfully assume to punish foreigners for alleged infractions of laws to which they were not subject at the time of the alleged offense.

Judge Altamira based his dissent on cases of protest against the exercise of jurisdiction by a state other than that of the nationality of the defendant or of the flag under which he sailed, and on cases in which states have recognized the prior claim of the jurisdiction of the flag of another state. In addition to citing ten cases of the two classes, he set forth a table of municipal legislation concerning jurisdiction over foreigners for offenses committed abroad. He insisted on the principle of territoriality to which

exceptions can be established only by common consent, and on the respect due to the rights of the individual. "International law in order to be real *law* must not be in contradiction with the fundamental principles of the legal order, one of which necessarily is the rights of men taken as a whole."

At the time of the announcement of the judgment of the court, it was widely commented that all the judges who came from maritime countries had dissented. This was not the case, however, for the judges of Italian and Japanese nationality were in the majority, and in the minority were the judges of Brazilian and Cuban nationality from countries where maritime interests are very important. The division is more properly explained on the basis of different conceptions as to the importance of the principle of the territoriality in international law. If it prevents the judgment from setting at rest the controversy over the question of principle, still the judgment represents a very notable contribution to our law of jurisdiction.

RE-ADAPTATION OF THE MAVROMMATIS JERUSALEM CONCESSIONS

On May 28, 1927, the Greek Minister at The Hague filed with the registry of the court an application instituting proceedings on behalf of the Government of the Greek Republic against the Government of His Britannic Majesty in Great Britain (in its capacity as Mandatory for Palestine), and seeking judgment that by its course in connection with the re-adaptation of the Mavrommatis Jerusalem Concessions, which had been prescribed by the court,[30] the British Government had not complied with the terms of the court's judgment, had violated its international obligations, had done irreparable injury to M. Mavrommatis, and is consequently bound to make reparation estimated at £217,000, with interest at 6 per cent. This application was duly communicated to the British Government on May 28, 1927. On June 4, 1927, the Greek case was filed with the court, formulating the Greek submissions. On August 9, 1927, the British Government filed with the registry of the court a preliminary objection to the court's jurisdiction, asking that the Greek claim be dismissed. The Greek Government was then invited to submit its reply by August 26, 1927, and it requested that the British objection be dismissed and that the case be reserved for judgment on the merits. On September 8, 9, and 10, 1927, oral statements were made to the court by Sir Douglas Hogg, His Britannic Majesty's Attorney General, and by Professor Gidel and Mr. Purchase as counsel for the Greek Government. The judgment of the court was given on October 10, 1927.[31]

The Mavrommatis Jerusalem Concessions had been considered by the court on two previous occasions. On August 30, 1924, a judgment[32] affirmed the court's jurisdiction, and on March 25, 1925, a second judg-

[30] In Judgment No. 5, Publications of the Court, Series A, No. 5, p. 50.

[31] Publications of the Court, Series A, No. 11.

[32] Judgment No. 2. For the writer's comment, see this JOURNAL, Vol. XIX, pp. 48–52.

ment [33] on the merits established the validity of the concessions and the right of the concessionaire to have them put into conformity with the new economic conditions prevailing in Palestine. Following this second judgment, the two governments entered into negotiations which resulted in the signing of new contracts by M. Mavrommatis and the Palestine Government on February 25, and 26, 1926, by which the agreements of 1914 were cancelled. Even before they were signed, Mavrommatis assigned his rights under the new contracts to a trustee for a company to be formed, but this assignment was objected to by the local British officials and was later "determined." The assignee had submitted plans, which Mavrommatis afterward adopted, and which were approved after some periods of delay. Damages were claimed for this delay. On January 17, 1927, the Greek Legation at London intervened on behalf of Mavrommatis, and when the intervention had proved unfruitful this application was filed.

The Greek submissions were (1) that the delay was a violation of the international obligations of the Mandatory under Article 11 of the mandate; (2) that Mavrommatis had unjustly suffered damage because of the delays and the hostility of British authorities; (3) and that the British Government is bound to make reparation, estimated at £217,000, with interest at the rate of 6 per cent. The British objections were: (1) that the court had no jurisdiction to decide as to its compliance with the previous judgment (but this point was later dropped by the British Government); (2) that under Article 11 of the mandate, the court's jurisdiction extends only to a breach of the Mandatory's international obligations resulting from the manner of the exercise by the Palestine Administration of its power to provide for public ownership or control of natural resources or public works, and in this case there has been no exercise of that power; (3) that the protocol of Lausanne conferred no jurisdiction on the court, with respect to an alleged violation, and alternatively that Mavrommatis had failed to exhaust his remedies before English or Palestinian courts.

The court first pointed out that jurisdiction in this case, which depends on later facts, does not flow from the jurisdiction established by the judgment of August 30, 1924. Yet the previous construction of Articles 11 and 26 of the mandate must be taken into account. The court's jurisdiction under Article 26 of the mandate does not extend to the protocol of Lausanne except in relation to Article 11 of the mandate. The court has to ascertain whether the facts alleged in support of the Greek claim constitute an exercise of the "full power for . . . public control" under Article 11. Delay in approving plans, not legally justifiable, would not constitute an exercise of the power. The alleged "hostility" amounts at most to a violation only of the 1926 contracts. It was not contended here that any of the Rutenberg concessions infringed Mavrommatis' rights. Hence, the court finds that the second British objection is well-founded, and a consideration of the

[33] Judgment No. 5. For the writer's comment, see this JOURNAL, Vol. XX, pp. 5–9.

third objection is therefore unnecessary. By a vote of seven to four,[34] the court decided to uphold the preliminary objection denying the court's jurisdiction. Excluding the instance in which the court refused to give an advisory opinion concerning the Eastern Carelian question, this is the first time that the court has refused to take jurisdiction.

Judge Nyholm, dissenting, gave wider scope to the provision in Article 26 of the mandate for the court's jurisdiction. He thought the present case a mere continuation of the former one; but if independent, then identical with the former one. Judge Altamira analyzed the terms of Article 11 and the course of action of Palestinian authorities due to the existence of the Rutenberg concessions, and concluded that the situation was identical with that which had existed in 1924. He was of opinion that the case should be reserved for judgment on the merits. M. Caloyanni, Greek national judge, dwelt upon the special nature of the mandate and the Mandatory's "special mission of tutorship," which render it impossible to "assimilate the Palestine Administration to an ordinary administration." Hence all its positive acts are acts of "public control," with reference to which the Mandatory has special international obligations. There was an incompatibility between the Rutenberg and the Mavrommatis concessions, and the latter are entitled to protection by reason of the international obligations accepted under the Lausanne protocol (XII). The new concessions are a continuation of the old contracts, the mandatory has not re-adapted the concessions as it was bound to do, and the court should take jurisdiction.

COMPETENCE OF THE EUROPEAN COMMISSION OF THE DANUBE

On September 18, 1926, representatives of France, Great Britain, Italy and Roumania, signed an agreement (*arrangement*) at Geneva, requesting the Council of the League of Nations to ask the court for an advisory opinion on three questions, as follows:[35]

> (1) Under the law at present in force, has the European Commission of the Danube the same powers on the maritime sector of the Danube from Galatz to Braila as on the sector below Galatz? If it has not the same powers, does it possess powers of any kind? If so, what are these powers? How far upstream do they extend?
>
> (2) Should the European Commission of the Danube possess either the same powers on the Galatz-Braila sector as on the sector below Galatz, or certain powers, do those powers extend over one or more zones, territorially defined and corresponding to all or part of the navigable channel to the exclusion of other zones territorially defined, and corresponding to harbor zones subject to the exclusive competence of the Roumanian authorities? If so, according to what criteria shall

[34] Judge Pessôa, who had taken part in the consideration of the case and had reached the conclusion that the court had jurisdiction, left The Hague before the judgment was put into final form.

[35] Court Document, Distr. 929, 1926.

the line of demarcation be fixed as between territorial zones placed under the competence of the European Commission and zones placed under the competence of the Roumanian authorities? If the contrary is the case, on what non-territorial basis is the exact dividing line between the respective competences of the European Commission of the Danube and of the Roumanian authorities to be fixed?

(3) Should the reply given to (1) be to the effect that the European Commission either has no powers in the Galatz-Braila sector, or has not in that sector the same powers as in the sector below Galatz, at what exact point shall the line of demarcation between the two régimes be fixed?

At its forty-fourth session, on December 9, 1926, the Council voted to ask the court to give an advisory opinion on these questions,[36] and its formal request was communicated to the court by the Secretary-General on December 18, 1926. The four governments concerned in the answers to these questions were invited to submit memorials, under Article 73 of the Rules of Court, and on April 12, 1927, memorials were presented on behalf of the British, French and Roumanian Governments. Various extensions of the time for presentation of replies were made, and replies were presented on behalf of the same three governments.

The dispute about the jurisdiction of the European Commission of the Danube is of long standing and numerous efforts have been made since the War to settle it.[37] In 1922, an enquiry was conducted by the executive committee of the European Commission of the Danube, but efforts to arrive at a *modus vivendi* at that time proved fruitless. In 1924, initiative was taken by the British Government, which brought the dispute before the Advisory and Technical Committee for Communications and Transit of the League of Nations. It was contended by the British Government that the treaty of London of March 10, 1883,[38] had extended the jurisdiction of the European Commission from Galatz to Braila, and that although Roumania had refused to accede to that treaty, an intermittent control over the Galatz-Braila section had been exercised by the commission until after the War. The Advisory and Technical Committee set up a special committee to conduct an enquiry and make a report; the enquiry was conducted during meetings at Geneva, on February 18, 1925, and March 30 to April 2, 1925, as well as in the course of a visit to the Danube itself, and the report of July 2, 1925, contains an exhaustive discussion of both the relevant texts and the practise under them, concluding with a series of conciliation proposals. The report of the special committee came before the Advisory

[36] League of Nations Official Journal, 1927, p. 150.

[37] The recent history of the dispute is set forth in the report of the special committee on the question of the jurisdiction of the European Commission of the Danube, set up by the Advisory and Technical Committee for Communications and Transit of the League of Nations, of July 2, 1925. See League of Nations Document, C. C. T./C. D./8. For the text of the Statute of the Danube, see 26 League of Nations Treaty Series, p. 174.

[38] 74 British and Foreign State Papers, p 20.

and Technical Committee for Communications and Transit in July, 1925. That committee expressed the opinion that "the jurisdiction of the European Commission of the Danube extends from Galatz to above Braila under the same conditions as from the sea to Galatz," but it suggested further negotiations with a view to a partial revision of the Statute of the Danube. To this end meetings were held between the members of the special committee and the members of the European Commission, but no agreement resulted, and the representatives of France, Great Britain, Italy and Roumania decided to seek the court's advisory opinion.

The questions before the court were argued at public sessions held on October 6–8, and 10–13, 1927, by Attorney General Sir Douglas Hogg, on behalf of Great Britain, by Professor Basdevant, on behalf of France, by M. Rossetti, on behalf of Italy, and by M. Contzesco, Professor de Visscher, M. Politis and M. Millerand, on behalf of Roumania. The opinion was read at a public session of the court, on December 8, 1927.

In answering the first question submitted, the court underlined the expression, "under the law at present in force." It referred first to the Definitive Statute of the Danube, which was signed on July 23, 1921, and which became effective on October 1, 1922. Under this statute, the jurisdiction of the European Commission covers the "maritime Danube" and extends "under the same conditions as before and without any modification of its existing limits," to the point at which the jurisdiction of the International Commission over the "fluvial Danube" begins; and the latter's jurisdiction is said to extend over the part of the river between Ulm and Braila. It was contended that the old difference of views as to the Treaty of London of 1883, to which Roumania was not a party but which purported to extend the jurisdiction of the European Commission from Galatz to Braila, was perpetuated by the Definitive Statute. But the court denied this, holding that the expression "under the same conditions as before and without any modification of its existing limits," referred to the ante-war situation as it existed in fact. It was not denied that the European Commission had in fact exercised some powers over the sector above Galatz.

While the Roumanian Government contended that above Galatz the European Commission had only "technical powers," representatives of the other countries thought that its powers were the same as those possessed for the sector below Galatz. The court referred to the preparatory work done at the time the Definitive Statute was elaborated, but recalled that it "should not be used for the purpose of changing the plain meaning of a text." It refused to consider records of the preparatory work which preceded the elaboration of the relevant articles in the Treaty of Versailles, such records "being confidential and not having been placed before the Court by or with the consent of the competent authority." Nor was the Roumanian contention to be sustained by reference to a "protocole interpretatif," of 1922, drawn up at the sixty-eighth meeting of the Danube Conference, for the

court considered this protocol but a part of the preparatory work which could not prevail against the terms of the statute itself.

Having interpreted Article 6 of the statute to give the European Commission jurisdiction from Galatz to Braila, the court then sought to discover "whether, in point of fact, the European Commission exercised, before the war, the same powers between Galatz and Braila as below Galatz." After reviewing the history of international regulation of rivers, and especially the treaties applicable to the Danube, the court concluded "that far from supporting the Roumanian contention that a distinction could and should be drawn between so-called technical and so-called juridical powers," the applicable "instruments would be fatal to any such view, unless a situation of fact had developed superseding the legal situation defined by the relevant international acts." On the questions of fact, the court accepted the findings of the special committee which reported in July, 1925. To the sixty-three cases of exercise of jurisdiction by the European Commission between 1883 and 1899 and between 1904 and 1914, the Italian representative had added five cases, one in each of the years 1899, 1901, and 1902 and two in 1903. The court examined the history of the exercise by the European Commission of powers relating to technical works, navigation dues, river police, pilotage, lighter services and superintendence of ballast, towage, protection of works, and jurisdictional matters, and comparing the powers exercised over the Galatz-Braila sector with those exercised over the sector below Galatz, it concluded that the former "cover practically the same ground." This enabled the court to give an affirmative answer to the first part of the first question. As to the up-stream limit of the powers of the European Commission, this was placed at a line drawn "immediately above the port of Braila," that port being quite obviously a part of the maritime Danube.

Proceeding to answer the second question put to it, the court examined the division of power between the European Commission and the Roumanian authorities. The Roumanian view was that certain sectors of the river were subject to the territorial authorities alone. But the court found no texts to support this view, and the powers possessed by the European Commission could not be exercised if the river were thus "dismembered." It was concluded "that, as regards the ports in question, the dividing line between the respective competences of the European Commission and the Roumanian authorities is of a non-territorial nature." "Although the European Commission exercises its functions 'in complete independence of the territorial authorities' and although it has independent means of action and prerogatives and privileges which are generally withheld from international organizations, it is not an organization possessing exclusive territorial sovereignty." "The European Commission is not a state, but an international institution with a special purpose." The freedom of navigation assured by various treaties relates to (1) the improvement of the technical conditions of naviga-

tion, (2) the upkeep of the channel and the policing of the river, and (3) the prohibition of navigation dues. To uphold this freedom, the commission must have powers covering navigation into and out of the ports, as well as through the ports. Hence the criterion emerged, that "in the ports of Galatz and Braila, the European Commission alone has jurisdiction over navigation," including "any movement of vessels forming part of their voyage." A second criterion seemed to follow naturally, based upon the economic contacts which it is the purpose of navigation to establish—that the European Commission is competent both in the ports and on the river itself to ensure the equal treatment of all flags.

The court's answers to the questions before it are therefore:

> (1) *a.* That under the law at present in force the European Commission of the Danube has the same powers on the maritime sector of the Danube from Galatz to Braila as on the sector below Galatz;
>
> *b.* That these powers extend up to the port of Braila, this port being included;
>
> (2) *a.* That the powers of the European Commission of the Danube extend over the whole of the maritime Danube, and are not excluded from any zones territorially defined and corresponding to harbour zones;
>
> *b.* That the dividing line between the respective competences of the European Commission of the Danube and of the Roumanian authorities in the ports of Galatz and Braila is to be fixed according to the criteria
>
> (i) of navigation, in the sense of the movement of ships as part of their voyage, the European Commission of the Danube being also competent in regard to navigation in ports, whether the ships are passing through or coming to or leaving their moorings, as far as navigation so understood is concerned;
>
> (ii) and of the obligation to ensure freedom of navigation and equal treatment of all flags, the European Commission of the Danube being competent, also as concerns the ports, to exercise the supervision inherent in this obligation;
>
> (3) That it is not necessary to give an answer to the question put under No. 3.

The opinion was reached by a vote of nine to one. Judges Nyholm and Moore concurred in the opinion, but each expressed separate observations. Judge Moore thought that the main question before the court "shrinks on legal analysis into a small compass and is essentially simple." He thought that the Statute itself "unequivocally and conclusively fixes Braila as the place to which the jurisdiction of the Commission extended before the war." Deputy-Judge Negulesco dissented in an able opinion which contains an exhaustive historical review. He found the European Commission to be "in reality an international organization which possesses its own sovereign powers on the territory of the Roumanian State;" hence the limits of its powers were more constrained. He thought the Statute of the Danube was itself limited by the provisions in the Treaty of Versailles, and that by the

latter the International Commission and not the European Commission possessed jurisdiction over the Braila-Galatz sector.

The court's opinion was communicated to the Council of the League of Nations, during its forty-eighth session in December, 1927.

QUESTION OF THE JURISDICTION OF DANZIG COURTS

On January 12, 1927, the Government of the Free City of Danzig sought from the High Commissioner of the League of Nations at Danzig, Dr. van Hamel, a decision that Danzig courts had jurisdiction of actions in respect of certain pecuniary claims brought by railway employees who had passed from the service of the Free City into Polish service, and that the Polish Railway Administration was bound to accept such jurisdiction and to enforce judgments of the Danzig courts in such actions. On April 8, 1927, the High Commissioner gave a decision,[39] against which on May 12, 1927, the Government of Danzig appealed to the Council of the League of Nations. In its forty-seventh session on September 22, 1927, the Council voted to ask the Permanent Court of International Justice to give an advisory opinion on the following question:[40]

> Is the Court of opinion that the High Commissioner's decision of April 8, 1927, given as a result of the requests made by the Danzig Government on January 12, 1927—in as far as his decision does not comply with those requests—is legally well-founded?

On September 24, 1927, the Secretary General communicated the Council's request to the court.

INTERPRETATION OF JUDGMENTS NOS. 7 AND 8

On October 18, 1927, the German Government filed with the registry of the court an application asking the court to give an authoritative interpretation of its two judgments which relate to the seizure of the factory at Chorzow, in that part of Upper Silesia which was ceded to Poland by Germany. It was explained that a "divergence of opinion" as to the meaning and scope of these judgments had arisen between the German and Polish Governments. The Polish Government had instituted proceedings in a Polish court at Kattowitz, by which it sought judgment that at the time of the seizure the factory was the property of the Reich, and not of a German company which claimed an interest in it, and that the factory now belonged to the Polish Treasury. The German Government contended that this question had been finally answered in favor of the German company by the two previous judgments of the court and was therefore *res judicata*.[41] The German Government sought judgment that the Polish contentions before

[39] League of Nations Document, C. 375, 1927, I.
[40] League of Nations Official Journal, 1927, pp. 1420–1423.
[41] See Court Document, Distr. 1079, 1927.

the court at Kattowitz are not in accordance with the true construction of Judgments Nos. 7 and 8 of the court.

The court invited the Polish Government to submit its observations on the German application, by November 7, 1927. Such observations were duly submitted, and the German Government was then permitted to file a statement in reply. The German Government requested that the court indicate the measures of interim protection which should be taken, under Article 41 of the Statute; it was argued that unless an immediate payment were made, the amount of the injury and consequently of the indemnity, would be greatly increased, and the injury might become irreparable. To meet this situation, the German Government requested that the Polish Government should be ordered to make an immediate interim payment of thirty million Reichsmarks. On November 21, 1927, the court issued an order refusing to give effect to the German Government's request. The court had previously reserved the question of indemnity for judgment on the merits, and the German Government's request did not relate so much to measures of interim protection as to part satisfaction of its claim for indemnity. It was therefore considered that the request of the German Government was not within the terms of the provisions of the Statute and the Rules of Court relating to orders for interim protection.

Public hearings were held on November 28, 1927, at which oral arguments were made by the German and Polish agents, MM. Kaufmann and Sobolewski. The judgment of the court was handed down on December 16, 1927. The request of the German Government was entertained under Article 60 of the Statute, which provides that "in the event of dispute as to the meaning or scope of the judgment, the court shall construe it upon the request of any party." In applying this article, a dispute must be found to exist, and the object of the request must be an "interpretation." But the Polish Government denied that any dispute existed. The court considered "that it cannot require that the dispute should have manifested itself in a formal way." It "should be sufficient if the two governments have in fact shown themselves as holding opposite views in regard to the meaning or scope of a judgment of the court." Preliminary diplomatic negotiations are not a condition precedent. Examination of the situation in fact led the court to find that a dispute did exist as to the meaning and scope of Judgment No. 7. The situation was not so clear as to Judgment No. 8, which merely established the court's jurisdiction, but it was thought that "certain passages of that judgment may in this connection be taken into account as showing the meaning and scope which the court when it pronounced Judgment No. 8 attributed to Judgment No. 7." Both of the German submissions were found to fall within Article 60 of the Statute.

On the merits, the court did not consider itself bound to confine its reply to a simple "yes" or "no" to the propositions formulated. "Within reasonable limits," the court was willing to "disregard the defects of form of docu-

ments placed before it." The German submissions did sufficiently indicate the points as to which a dispute existed, chiefly a passage in Judgment No. 7 to the effect that "if Poland wishes to dispute the validity of this entry, it can, in any case, only be annulled in pursuance of a decision given by the competent tribunal." This passage was not intended to reserve to Poland resort to her municipal courts to determine the title of the *Oberschlesische* to the Chorzow factory. The court had found that title established. Such an interpretation had been given to Judgment No. 7 in Judgment No. 8. Hence, the meaning of the disputed passage in Judgment No. 7 was clear. As to its scope, Judgment No. 7 was a declaratory judgment. Its interpretation adds nothing to its force as *res judicata*. When giving an interpretation, the court "refrains from any examination of facts other than those which it has considered in the judgment under interpretation." The judgment of interpretation arrived at was

> that in Judgment No. 7, the court did not reserve to the Polish Government the right of asking by process of law, even after the rendering of that judgment and with application to that particular case, for a declaration that the entry, in pursuance of the agreement of December 24, 1919, of the name of the *Oberschlesische Stickstoffwerke A. G.* in the land registers as owners of the Chorzow factory is null and void; but that, by the aforesaid judgment, the court meant to recognise, with binding effect between the parties concerned and in respect of that particular case, amongst other things, the right of ownership of the *Oberschlesische Stickstoffwerke A. G.* in the Chorzow factory under municipal law.

This judgment was reached by a vote of eight to three. Judge Anzilotti, dissenting in a separate opinion, emphasized that "a binding interpretation of a judgment can only have reference to the binding portion of the judgment construed." He found that no real dispute existed between the German and Polish Governments, their divergence being reduced "to a question of words." He refused to extend the doctrine of *res judicata* to cover incidental or preliminary questions involved in reaching the court's judgments, and concluded that the German request for interpretation should not have been entertained.

AMENDMENT OF THE RULES OF COURT

On September 7, 1927, the court announced the adoption of an amendment of Article 71 of the Rules of Court, relating to advisory procedure. This article originally read:[42]

> Advisory opinions shall be given after deliberation by the full Court. The opinions of dissenting judges may, at their request, be attached to the opinion of the Court.

On July 31, 1926, this text was amended to read:[43]

[42] Publications of the Court, Series D, No. 1, p. 81.
[43] *Ibid.*, p. 63.

> Advisory opinions shall be given after deliberation by the full Court. They shall mention the number of the judges constituting the majority.
>
> Dissenting judges may, if they so desire, attach to the opinion of the Court either an exposition of their individual opinion or the statement of their dissent.

On September 7, 1927, a new paragraph was added, after the first paragraph, as follows:[44]

> On a question relating to an existing dispute between two or more States or Members of the League of Nations, Article 31 of the Statute shall apply. In case of doubt, the Court shall decide.

This represents a further step in the assimilation of the procedure with reference to advisory opinions to that in contested cases. It means that if the opinion sought relates to a dispute between two or more states, each of these states, if it has no national among the judges, may appoint one of its nationals to sit as judge *ad hoc*, just as it might do if it were party to a case submitted to the court for judgment.

JURISDICTION OF THE COURT

Each year since its creation, the court's jurisdiction has been enlarged by provisions in treaties between various countries, and at the end of each year the court finds itself more deeply embedded in the world's treaty law. On August 31, 1927, the Protocol of Signature had been signed by fifty-two states or members of the League of Nations, of which forty had ratified.[45] Germany deposited her ratification on March 11, 1927. The Optional Clause, providing for the compulsory jurisdiction of the court in conformity with Article 36, paragraph 2, of the court's Statute, receives each year, also, a wider acceptance. On August 31, 1927, it had been signed on behalf of twenty-five countries, and ratified (or ratification had been dispensed with) on behalf of seventeen countries. Such acceptance is in most cases for a period of years. On January 12, 1927, Austria renewed her acceptance of it for ten years, ratifying the renewal on March 13, 1927.[46] On March 3, 1927, Finland renewed her acceptance for ten years. On July 25, 1927, Switzerland renewed her acceptance for a period of ten years. On September 23, 1927, M. Stresemann, German Minister for Foreign Affairs, signed the clause and made the following declaration (translation):[47]

> On behalf of the German Government, I recognise as compulsory, *ipso facto* and without special agreement, in relation to any other Mem-

[44] Publications of the Court, Series D, No. 1, (*addendum*).

[45] League of Nations Document, A. 13 (a), 1927. Annex. The Irish Free State is now included in the list of signatories, in accordance with its request of August 21, 1926. Explaining this request, on November 30, 1926, the Minister for External Affairs told the Dail: "It is merely a request that our name should be put down as adhering to a Covenant which we were actually bound by." 8 Journal of the Parliaments of the Empire, p. 190.

[46] Publications of the Court, Series E. No. 3, p. 83.

[47] League of Nations Document, C. L. 129, 1927, V.

> ber or State accepting the same obligation, the jurisdiction of the Court in conformity with Article 36, paragraph 2, of the Statute of the Court for a period of five years, in any disputes arising after the ratification of the present declaration with regard to situations or facts subsequent to this ratification, except in cases where the parties have agreed or shall agree to have recourse to another method of pacific settlement.

It must be noted however, that at the British Imperial Conference, in 1926, the report of the Inter-Imperial Relations Committee unanimously adopted by the conference on November 19, 1926, offered little hope of an early signature of the Optional Clause by any of the British nations:

> Whilst the members of the Committee were unanimous in favouring the widest possible extension of the method of arbitration for the settlement of international disputes, the feeling was that it was at present premature to accept the obligations under the Article [36] in question. A general understanding was reached that none of the Governments represented at the Imperial Conference would take any action in the direction of the acceptance of the compulsory jurisdiction of the Permanent Court, without bringing up the matter for further discussion.[48]

In addition to the wider acceptance of the Optional Clause, a significant treaty of friendship, conciliation and arbitration was signed at Rome, on April 5, 1927, on behalf of the Hungarian and Italian Governments, which provides for arbitration failing conciliation; and in a protocol signed at the same time, provision was made for "the right to submit a dispute of a legal nature by special agreement to the Permanent Court of International Justice," and if the special agreement is not "drawn up within six months after notice of a request for arbitration, either of the parties may refer the dispute by ordinary application to the Permanent Court of International Justice."[49]

PUBLICATIONS OF THE COURT

The third annual report of the court,[50] which covers the period from June 15, 1926, to June 15, 1927, is the most complete report yet issued. It is particularly useful to students of the court because of its excellent analytical index of the judgments and opinions (pp. 140–172), the digest of decisions taken in application of the Statute and Rules of Court (pp. 173–227), and the new bibliographical list (pp. 255–330) which continues the list published a year earlier.[51] It also contains an *addendum* to the collection of texts governing the jurisdiction of the court,[52] which shows that this jurisdiction is now in some way dependent on two hundred and two international instruments.

[48] British Parliamentary Papers, 1926, Cmd. 2768, p. 28. See also this JOURNAL, Vol. 21 (Supp.), p. 36.

[49] Publications of the Court, Series E, No. 3, p. 415.

[50] Publications of the Court, Series E, No. 3.

[51] *Ibid.*, No. 2.

[52] Publications of the Court, Series D, No. 5 (3rd edition).

In this report, the following states, not members of the League of Nations and not mentioned in the Annex to the Covenant, are listed as having been notified by the court that they are entitled to appear before it: [53] Afghanistan, Danzig (through the intermediary of Poland), Egypt, Georgia, Iceland, Liechtenstein, Mexico, Monaco, Russia, San Marino, Turkey. It seems doubtful whether Georgia ought to continue to be regarded as a state entitled to appear before the court. The notification may have been sent in 1922, but changes since that date would seem to indicate clearly that Georgia is now a part of the Union of Soviet Socialist Republics. Periodical revision of the list seems desirable, but the rules of court make no provision for it.

FINANCES OF THE COURT

The budget estimates of the court for 1927 provided for a credit of 1,029,177.83 Dutch florins. The estimates approved by the court for 1928 call for a credit of 1,042,296.56 Dutch florins. This sum was voted by the Eighth Assembly of the League of Nations on September 27, 1927.[54] At the Assembly, "the Fourth Committee desired to pay a tribute to the generous act of the Netherlands Government, which, by the loan of 240,000 florins, without interest, to the Carnegie Foundation at The Hague, made it possible to enlarge the premises" in the Peace Palace at the disposal of the court, "without appreciably adding to the Court's budget." To enable the Foundation to repay the Netherlands Government, it was recommended that "the Assembly should approve the entry in the Court budget for each financial period between 1929 and 1952 of an additional credit of 10,000 florins as a supplementary contribution to the Foundation by the Court for that period."

ELECTIONS BY THE COURT

The president and vice-president of the court hold office for a period of three years. The first president, Judge Loder, served for the years 1922–1924, the second president, Judge Huber, for the years 1924–1927. On December 6, 1927, Judge Anzilotti was elected president for the years 1928–1930. On the same date, Judge Weiss was elected vice-president for the coming term. The special chambers of the court have been reconstituted for three years as follows: Chamber for Labor Cases, Judges Anzilotti, Huber, Finlay, de Bustamante and Altamira; Chamber for Transit and Communications Cases, Judges Weiss, Nyholm, Moore, Oda and Pessôa. The special Chamber for Summary Procedure, reconstituted annually, consists for 1928 of Judges Anzilotti, Huber and Loder.

POSITION OF THE UNITED STATES

The proposed signature of the Protocol of Signature on behalf of the United States of America, with certain reservations, still awaits consumma-

[53] Publications of the Court, Series E, No. 3, p. 98.

[54] League of Nations Document C. 520. M. 178, 1927, X.

tion, and little progress has been made during the course of the past year. Since the adjournment of the conference of signatories held in Geneva from September 1 to September 23, 1926,[55] forty-four signatories have replied to the communication of the Secretary of State of the United States.[56] Of these replies, twenty-one conform to the recommendation made by the conference of signatories; seven countries accepted the proposals of the United States without condition; and sixteen countries sent mere acknowledgments.

Meanwhile, the proposal of the United States has been widely discussed. The minutes of the conference of signatories have been published and made available in America.[57] A very important paper has appeared by Senator Thomas J. Walsh,[58] supporting the suggestion that the question as to the nature of the vote required in the Council for a request for an advisory opinion, be referred to the court "for determination," and expressing the view that the draft protocol proposed by the conference would accord to the United States "rights it has not asked and does not care to exercise," and would withhold "the very privileges the Senate deemed essential to safeguard the interests" of the United States as a non-member of the League of Nations. Less significant are the articles by M. Raul Fernandes[59] to the effect that "the only possible solution is the formal admission that a request for an advisory opinion is one of those questions for which a unanimous vote" in the Council is required by Article 5 of the Covenant; by Miss Esther Everett Lape,[60] giving special interpretation to the Senate resolution; and by Dr. David Jayne Hill,[61] expressing a very unsympathetic view of the problem.[62]

[55] For the best analysis of the work of the conference, published to date, see Quincy Wright, "The United States and The Permanent Court of International Justice," in this JOURNAL, Vol. XXI, pp. 1–25. An excellent discussion of the question before the United States Senate is that by James W. Garner, in 8 *Revue Générale de Droit International Public* (2 Ser.), pp. 139–164.

[56] This information is based on a letter written by the Chief of the Division of Western European Affairs of the Department of State on December 5, 1927.

[57] Publications of the League of Nations, V. Legal, 1926, V. 26. This may be obtained through the World Peace Foundation, 40 Mt. Vernon St., Boston, Massachusetts.

[58] "The Present World Court Situation," 15 Kentucky Law Journal, pp. 299–315.

[59] "The United States and the Permanent Court of International Justice," translated and published by the American Foundation, 565 Fifth Avenue, New York. See the comment of Mr. Charles E. Hughes, before the American Society of International Law, April 28, 1927, in Proceedings of the Society, 1927, p. 15.

[60] "A Way Out of the Court Deadlock," in the Atlantic Monthly for October, 1927, pp. 517–532.

[61] The Problem of a World Court—The Story of an Unrealized American Idea. Longmans, 1927, pp. xxi, 204.

[62] See also Kraus, "*La Cour Permanente de Justice Internationale et Les Etats-Unis d'Amerique*," in the *Revue de Droit International et de Législation comparée*, Nos. 3–4, 1926, pp. 281–320.

THE INTERNATIONAL RADIOTELEGRAPH CONFERENCE OF WASHINGTON

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The International Radiotelegraph Conference of Washington was opened on October 4, 1927, with an address by President Coolidge [1] and was closed on November 25, 1927, with the signing of an International Radiotelegraph Convention and Annexed General Regulations by delegates representing 78 governments [2] and a set of Annexed Supplementary Regulations by representatives of 75 governments.[3] In his closing address, Secretary Hoover, president of the conference, referred to it as "the largest international conference of history." [4]

The Washington Convention, embodying the general principles agreed

* Technical Adviser to the American delegation to the International Radiotelegraph Conference.

[1] Published in New York Times, October 5, 1927.

[2] Union of South Africa, French Equatorial Africa and other colonies, French West Africa, Portuguese West Africa, Portuguese East Africa and the Portuguese Asiatic possessions, Germany, Argentine Republic, Commonwealth of Australia, Austria, Belgium, Bolivia, Brazil, Bulgaria, Canada, Chile, China, Republic of Colombia, Spanish Colony of the Gulf of Guinea, Belgian Congo, Costa Rica, Cuba, Curacao, Cyrenaica, Denmark, Dominican Republic, Egypt, Republic of El Salvador, Eritrea, Spain, Estonia, United States of America, Finland, France, Great Britain, Greece, Guatemala, Republic of Haiti, Republic of Honduras, Hungary, British India, Dutch East Indies, French Indo-China, Irish Free State, Italy, Japan, Chosen, Taiwan, Japanese Sakhalin, the Leased Territory of Kwantung and the South Sea Islands under Japanese Mandate, Republic of Liberia, Madagascar, Morocco (with the exception of the Spanish Zone), Mexico, Nicaragua, Norway, New Zealand, Republic of Panama, Paraguay, the Netherlands, Persia, Peru, Poland, Portugal, Rumania, Kingdom of the Serbs, Croats, and Slovenes, Siam, Italian Somaliland, Sweden, Switzerland, Surinam, Territories of Syria and The Lebanon, Republic of San Marino, Czechoslovakia, Tripolitania, Tunis, Turkey, Uruguay, and Venezuela. Of these Liberia, Persia and Rumania signed *ad referendum*. In signing the general regulations, Poland made a reservation concerning paragraph 4 of Article 5 in the terms found in the *procès verbal* of the eighth plenary session, Nov. 22.

A statement was inserted in the *procès verbal* of the eighth plenary session, Nov. 22, to the effect that the list of names appearing in the preamble as those of the contracting governments should not affect the question of votes in the next Conference.

The convention and regulations were sent to the Senate by the President on December 12, 1927, and the injunction of secrecy removed from the document on December 17. An English translation of the convention and regulations has been published as Senate Document, Executive B, 70th Congress, 1st Session. That document, hereinafter referred to as Executive B, also contains English translations of the *procès verbaux* of the plenary sessions.

[3] All of the countries listed in note two except the United States, Canada and Honduras.

[4] *Procès verbal* of ninth plenary session, Nov. 25, 1927; Executive B, p. 288.

upon by the conference, is the third of the series of conventions treating generally of the subject of radio.[5] The Berlin Convention of 1906 [6] was the first international convention which purported to cover the field of radio as it currently existed; it is of little or no importance now, as it is binding only as between countries adhering to it, when one of the interested governments has not become a party to the London Convention of 1912.[7] This latter convention, which is at present in force and will continue to be binding until it is superseded by the Washington Convention, had at the time of the opening of the 1927 conference been adhered to by 97 separate contracting parties.[8] By the time of the second plenary session, held on October 25,[9] four additional countries had adhered to the London Convention, and the adherence of still another was announced at the third plenary session, November 3.[10] Of the original 97, several adhered only a short time before the convening of the Washington Conference. The reason for adherence at that time was that the 1912 convention, under the terms of which the 1927 conference was held, permitted only governments which were parties to that convention to participate in subsequent conferences with the right to vote.

The fifteen years between the signing of the London and the Washington Conventions were exceedingly important in the field of radio communication, and the need of revising the London Convention was felt long before the 1927 conference. At the time the London Convention was signed, it was thought that the next radiotelegraph conference would be held in Washington in 1917. The World War, however, made impossible the convening of a conference at or near the tentative date. As the London Convention was not sufficient adequately to provide for the regulation of the enlarged field of radio communication, the Allied and Associated Govern-

[5] Of course, conventions not in this series have contained provisions bearing upon radio, or even, as in the case of the draft prepared by the Commission of Jurists in 1922, have been devoted to a particular phase of radio. The various earlier provisions of multilateral treaties bearing upon radio are to be found conveniently listed in *The Law of Radio Communication* by Stephen Davis, pp. 175–185. In addition to those treaties which have radio as their special subject matter, Judge Davis mentions the Convention Respecting the Rights and Duties of Neutral Powers and Persons in War on Land (1907), the Convention for the Adaptation to Naval War of the Principles of the Geneva Convention (1907), the Convention Concerning the Rights and Duties of Neutral Powers in Naval War (1907), the unratified Declaration of London (1909), the Convention for the Safety of Life at Sea (1914), the resolution on Radio Stations in China passed by the Limitation of Armament Conference of Washington (1922), and the draft prepared by the Commission of Jurists (1922). To this list should be added the Convention for the Regulation of Aerial Navigation (1919).

[6] U. S. Treaty Series No. 568; Malloy, Treaties, Conventions, International Acts, Protocols, etc., Vol. III, p. 2889.

[7] U. S. Treaty Series No. 581; Malloy, Vol. III, p. 3048.

[8] *Procès verbal* of the opening session; Executive B, p. 100.

[9] *Procès verbal* of the second plenary session; Executive B, p. 134.

[10] *Procès verbal* of the third plenary session; Executive B, p. 153.

ments prepared and put into effect a draft of revised radio regulations responsive to current developments.[11]

A resolution was adopted at Paris by the five Principal Allied and Associated Powers, looking toward the convoking of an international congress to consider all international aspects of communication by land telegraphs, cables, or radio. A conference, preliminary to such an international conference and composed of representatives of the Principal Allied and Associated Powers, convened at Washington on October 8, 1920.[12] The product of the labors of this preliminary conference was a draft of convention and regulations for a universal electrical communications union, to serve as the basis for an electrical communications conference. A technical conference held in Paris in July and August of the following year revised the technical parts of the Washington draft. Differences of opinion as to the advisability of forming an electrical communications union led to a decision to hold separate telegraph and radiotelegraph conferences. The Telegraph Conference was held in Paris in 1925, the Telegraph Regulations there adopted including as well a number of radio regulations.[13]

One of the results of these various conferences and conventions and regulations was that by the time of the opening of the Washington Conference, the problem of adjusting radio regulation to the present state of the radio art had been given thorough consideration. The governments invited to participate in the Washington meeting were well aware of the questions which would arise; and the delegates, familiar with the viewpoints of the various countries, were prepared to take all the steps which should prove necessary to reach an agreement on the proper solution of these questions.

As the basis for its labors, the Washington Conference had a Book of Proposals compiled by the International Bureau of the Telegraph Union at Berne from replies received to requests for proposals of modifications to be made in the London Convention and in the revised Washington draft of 1920. The book was printed in two columns: on the left appeared the

[11] The EU-F-GB-I (United States, France, Great Britain, Italy) Radio Protocol of Aug. 25, 1919. This document was published by the United States Navy Department in 1920.

[12] Provided for by an act dated Dec. 17, 1919, 41 Stat., Vol. I, p. 367.

[13] Particularly Articles 1 and 64; see page 34 *infra*. It is of interest to note that at its second plenary session, the Paris Conference passed the following resolution: "The conference expresses the opinion that, after the Radiotelegraph Conference of Washington, the contracting governments should consider the best way of modifying the St. Petersburg Convention, and of introducing into it the provisions of the Radiotelegraph Convention by a congress possessing the necessary powers. It expresses the hope that the Washington Conference may be able to make a similar recommendation."

At the eighth plenary session, Nov. 22, the following resolution passed by the Convention Committee on Nov. 19 was adopted: "The International Radiotelegraph Conference of Washington expresses the desire that the contracting governments shall examine the possibility of combining the International Radiotelegraph Convention with the International Telegraph Convention, and that, eventually, they shall take the necessary steps for this purpose." Executive B, p. 271.

articles of the London Convention and of the Washington draft, while on the right appeared proposals for the amendment of the particular articles or for the insertion of relevant new matter. The book proper contained 601 pages with 1768 separate proposals. It was circulated for study several months before the date set for the convening of the conference. After the publication of the book, various additional proposals were sent to the Bureau and were circulated in the form of Supplements to the Book of Proposals. Still other proposals were made during the course of the conference, so that by the time the conference adjourned a total of 1951 proposals had been circulated and had been considered by the conference.

ORGANIZATION OF THE CONFERENCE

The conference was opened by President Coolidge at 3.00 p. m., October 4, 1927, with a brief address emphasizing the importance of the work before it.[14] Mr. G. J. Hofker, head of the delegation from the Netherlands, acting as dean of the conference in the absence of Count Hamilton of Sweden, responded and nominated Mr. Herbert Hoover, head of the delegation of the United States, as president of the conference. Mr. Hoover was elected by acclamation. In his address the new president alluded to a number of the problems confronting the conference and touched in particular upon one which loomed large at the beginning of the conference—that of providing regulations which would be acceptable to those countries in which the control and management of radio communication were in the hands of private enterprises as well as those in which such communications were operated by government administrations.

The first plenary session of the conference, held on October 5, was devoted largely to the adoption of rules of procedure and the organization of committees.[15] Printed copies of a "Draft of Rules of the Conference, Submitted by the President" had been distributed in advance. In the main, the draft followed the rules which had governed the procedure of the London Conference. The more important alterations were those in Article 2 giving the president the power to select a vice-president to preside in his absence and to appoint such acting vice-presidents as might be necessary, and in Article 5 recognizing in a qualified manner the use of English. The first of these changes was made necessary because the demands upon Mr. Hoover's time were such that it would be impossible for him to be present at all of the plenary sessions. Under this provision, the president immediately designated Judge Stephen Davis, vice-chairman of the United States delegation, as vice-president. On the occasions when Judge Davis also was unable to be present, the Honorable Wallace White, Member of Congress from Maine, was designated to preside. In all three cases the conference was very fortunate in the choice of its presiding officers.

[14] *Procès verbal* of the opening session; Executive B, pp. 77–118.

[15] *Procès verbal* of the first plenary session; Executive B, pp. 119–128.

Article 5 of the draft rules provided that French should be the official language of the conference. It continued: "Nevertheless, since the presiding administration has so requested, and as an exceptional measure, English may be used. Delegations are recommended to use this privilege with discretion. Translations from French into English and *vice versa* will be made only at the request of a delegation. French alone will be used for the *procès verbaux* and the text of the convention and regulations." On the floor of the conference the Italian delegation moved to replace the third quoted sentence by the following: "Declarations, remarks and speeches pronounced in English shall immediately be translated into French." The Chinese delegation in supporting this motion suggested the following addition to it: "Those pronounced in French shall be translated into English only upon request of a delegation." The article was adopted with the amendments suggested by these two delegations.

In the course of the discussion on the adoption of Article 5 of the Rules of Procedure the Japanese delegation indicated that it desired translations from French into English. This was followed at the first meeting of the Convention Committee by a request on behalf of that delegation that all statements made in French be translated into English without further request for translations of particular remarks.[16] This procedure was adopted and was followed at all committee meetings where translation was desired as well as in plenary sessions. All documents necessary to the work of the conference were published in French by the Bureau of the conference, but unofficial English translations were usually furnished by the American delegation shortly after the distribution of the French originals.

A plan for the organization of the committees of the conference, together with an assignment of the committee chairmanships and vice-chairmanships by countries, had been prepared in advance of the opening of the conference and distributed prior to the first plenary session. Before submitting the suggested plan to the conference, the president announced some changes in the list of committee chairmanships and vice-chairmanships. The list as amended by the Chairman and adopted by the conference without change,[17] is as follows:

Committee	*Chairman*	*Vice-Chairman*
1. Convention	United States	Canada
2. General regulations	Great Britain	Spain
3. Mobile and special service regulations	Germany	Brazil
4. Point-to-point regulations and regulations for other services	Uruguay	
5. Special section to consider the report of the Committee on the Study of Code Language	Italy	Czechoslovakia
6. Tariffs, word count, and accounting	Italy	Australia

[16] *Procès verbal* of first meeting of Convention Committee, Oct. 7.

[17] *Procès verbal* of first plenary session, Oct. 5.

Committee	*Chairman*	*Vice-Chairman*
7. Technical	France	Denmark
8. Drafting	Belgium	Sweden
9. International Code of Signals	Japan	Netherlands
10. Work of the International Bureau	China	Mexico

At the second plenary session, October 25, a committee on full powers was appointed, consisting of the heads of the delegations from Finland, as chairman, Siam and Venezuela.[18]

Though the chairmanship of the Convention Committee was assigned to the United States, all of the sessions of that committee were presided over by the head of the Canadian delegation. Italy was given the chairmanship of one of the regular committees of the conference (tariffs, word count, and accounting). In addition, because of the highly specialized character of the work to be performed by the Committee to Consider the Report of the Committee on the Study of Code Language, which latter committee had met at Cortina d'Ampezzo, Italy, in 1926, under the chairmanship of the chief of the Italian delegation to the Washington Conference, the chairmanship of this special committee was likewise given to Italy. This special committee of the conference had an interesting, though brief, history, which will be touched upon later.[19]

As the Book of Proposals had been the subject of study prior to the conference with a view to the assignment of proposals to the various committees, the president submitted a preliminary list of assignments of proposals at the first plenary session. Tentatively, each committee was composed of representatives of those governments which had made proposals included within the list referred to that committee. As a delegation, however, might obtain assignment to any committee by notifying the Director of the International Bureau of its desire to serve on such committee, each delegation was represented on such committees as it cared to be.

At its first session the Convention Committee adopted as a rule of procedure, that before an article would be discussed by the committee it must be considered by a sub-committee consisting of delegates representing those governments which had made proposals for the amendment of the particular article.[20] In practice, the subcommittee was enlarged to include any delegates who desired to attend. Prior to each session of the subcommittee, its chairman prepared a transactional text of each article to be considered at that session, based upon a consideration of the various proposals for the amendment of the particular article. After a number of transactional texts had been debated, amended and finally adopted by the subcommittee, the full committee would adopt them, with or without amendment. Similar procedure was established for most of the other committees, some of which had three or more subcommittees.

[18] *Procès verbal* of second plenary session; Executive B, p. 136.

[19] See page 38 *infra*.

[20] *Procès verbal* of first meeting of Convention Committee, Oct. 5.

After an article had been adopted by the appropriate committee, the language in which it was couched was revised by the chairman and the rapporteurs of the Drafting Committee for consideration by the Drafting Committee.[21] Only after that committee had placed them in proper form did the articles come before the plenary session. In plenary session, they received two readings; the first as groups of articles came from the Drafting Committee, the second at the closing session of the conference when the entire treaty was read for the second time, the reading being of articles by number only.

THE TWO SETS OF REGULATIONS

The relationship between the Telegraph Convention and Regulations and the Radiotelegraph Convention and Regulations promised to be one of the most difficult problems of the conference.[22] The Telegraph Convention remains as it was drawn up in St. Petersburg in 1875, while the most recent regulations annexed to that convention are those drawn up in Paris in 1925. Although the United States and Canada, among other countries, have never adhered to the Telegraph Convention and Regulations, those documents are in effect among most of the countries participating in the Washington Conference.

The complications arose largely from the fact that the Regulations Annexed to the London Radiotelegraph Convention, to which the United States is a party, provide in Article 50 that:

> The provisions of the International Telegraph Regulations shall be applicable analogously to radio correspondence in so far as they are not contrary to the provisions of the present regulations.

The article then specifically enumerates a number of articles of the Telegraph Regulations applicable to radio communications. The first article of the Paris Telegraph Regulations provides:

> So far as these Regulations do not provide otherwise, provisions applicable to wire communications are also applicable to wireless communications.

In addition to this blanket clause and to several brief provisions applying specifically to radiotelegrams, the Paris Regulations contain an entire article (64), several pages in length, governing radiotelegrams. Paragraph 19 of this article states:

> Modifications of the provisions of these Regulations relating to radiotelegrams and to telegrams for multiple destinations (Art. 69), which may be rendered necessary in consequence of decisions of subsequent Radiotelegraph Conferences, will be put into force on the date fixed for the application of the provisions made by each of these latter Conferences.

[21] To Mr. Pierart, of Belgium, chairman of the Drafting Committee, more than to any other single individual, belongs the credit for the final form of the convention and regulations.

[22] See the notes exchanged between the United States and France prior to the Paris Conference; Dept. of State press release Sept. 28, 1927, U. S. Daily, Sept. 29, 1927.

The situation which confronted the conference was this: On the one hand, the governments not parties to the Paris Regulations did not desire to adopt without consideration rules in the formation of which they did not participate or of which the operation might involve constitutional difficulties. Moreover, they did not desire to incorporate by reference, rules which in the future might be altered without their consent. On the other hand, the parties to the Telegraph Regulations were opposed to reopening questions which had been settled only two years previously after long discussion and serious consideration. They felt that in services as analogous as cable and point-to-point radio, different rules should not be permitted to obtain. And they objected even to writing into the Radio Regulations the exact wording of the Paris Regulations, because future amendments of the Telegraph Regulations would not affect the corresponding changes in the Radio Regulations.

To this complication, a further one was added. While most of the important Powers represented at the conference conducted their own communication services, those services in the United States were largely in the hands of private enterprises. This meant that most of the delegates could act as representatives of governments and as heads of telegraph administrations, while the delegates of the United States were present solely as representatives of their government. Consequently, the United States delegation was compelled to refrain from taking part in those matters which were a matter of internal administration as distinguished from those of governmental concern.

This dual problem was given serious consideration by the American delegation prior to the conference. The American proposals for the amendment of the London Convention were divided into two groups: the first, the Convention and the annexed Government Regulations; the second, so-called Management Regulations.[23] At the first meeting of the Convention Committee on October 7, Judge Davis, on behalf of the delegation of the United States, formally called attention to the proposed division of the regulations into two parts.[24]

After much informal discussion of the situation with delegates from other countries, the American delegation, on October 25, presented a plan for the solution of the difficulty.[25] In brief, its four points were: (1) that the convention and annexed regulations adopted by the conference be divided into three classes, of equal binding force among the countries which signed

[23] The Management Regulations were to be signed by the operating agencies, whether government administrations or private companies. A clear and concise statement of the United States position was printed in French and Spanish, as well as English, and distributed prior to the conference. See *Projet de Convention Radioélectrique Internationale et de Règlements Gouvernementaux Annexés*, and *Proyecto de Convención Internacional de Radio y Reglamentaciones de Gobierno Anexas* (Government Printing Office, 1927).

[24] *Procès verbal* of the first meeting of the Convention Committee.

[25] At the sixth meeting of the Subcommittee of the Convention Committee.

them, namely, the convention, general regulations, and supplementary regulations; (2) that the convention consist of general provisions covering the subjects included in the London Convention and any further proposals of an amendatory character which might be adopted at the conference; (3) that the general regulations include the provisions which all governments agree must, in the public interest, be followed by their operating agencies, whether publicly or privately owned; (4) that the supplementary regulations include all rules which the countries adhering to the International Telegraph Convention and Regulations consider desirable among themselves, either in addition to those regulations or as modifications of them, and any further provisions which might be deemed advisable by the conference. It was stated that the United States expected to become a party to the convention and general regulations but not to the supplementary regulations. The heads of a number of important delegations immediately declared themselves in favor of the adoption of the plan, and it was followed by the conference without a formal vote being taken on it.

No attempt was made to separate the articles in the committees which acted upon them in the first instance, though a number of changes were made from time to time in order to avoid the necessity of certain articles being placed in the supplementary regulations. The division of the regulations into two groups was not definitely made until the Drafting Committee met to prepare the text of the entire convention and regulations for second reading, although the United States delegation made a preliminary designation on November 17.[26] The desires of the United States in the matter of placing certain articles in the supplementary regulations, arrived at in conjunction with Canada, were observed by the conference; and the document as it appears in its final form carries in the supplementary regulations only those articles which were placed there at the request of the United States.[27]

VOTES

Aside from technical problems, the question which offered the most difficulty was that of voting. The provisions of Article 12 of the London Convention on this point were unusual. According to that article, each country was entitled to one vote. If, however, a government adhered to the convention for its colonies, possessions or protectorates, subsequent conferences might decide that such colonies, possessions or protectorates, or a part thereof, should be considered as forming a country as regards the right to vote. The only qualification upon this was that the votes at the disposal

[26] At a joint meeting of the General Regulations, Mobile Services, Point-to-Point Services, and Technical Committees called for that purpose; see *procès verbal* of that session.

[27] In the *procès verbal* of the seventh plenary session, Nov. 19, there was inserted a statement by the American delegation that references in the convention or general regulations to provisions of the supplementary regulations should not be binding upon the United States. Executive B, p. 240.

of one government, including its colonies, possessions or protectorates, might never exceed six. The article concluded with a list of dominions, colonies, possessions and administrative units each of which was to be given a vote under the terms of the article.

The net effect of the article was to give Germany, the United States, France, the British Empire and Russia six votes each; Italy, the Netherlands and Portugal three votes each; Belgium, Spain and Japan two votes each; and the remainder of the contracting parties one vote each.

Whatever might have been the justification of such a provision in 1912, clearly it did not represent any adequate measure of the relative importance of the contracting countries in radio communication in 1927. Moreover, certain complicating factors had arisen. Germany had lost the colonies which had nominally been given the five extra votes accorded to the German Empire.[28] The Irish Free State had been created, and it was clearly apparent that strenuous efforts would be made to obtain for it the right to vote. Japan had been given six votes in the Washington Draft Convention of a Universal Electrical Communications Union[29] and gave notice that a similar number would be requested at the Washington Conference.[30] In addition a number of other countries had indicated their dissatisfaction with the existing arrangement.

The most comprehensive proposal for the modification of Article 12 was submitted by the British Government.[31] Briefly, it was to the effect that every independent state, dominion, colony, possession, protectorate, or territory under mandate which conducted public communication services or authorized private enterprises to conduct such services might become a contracting country and as such be entitled to one vote. Under such a plan the internal organization of the communications system would be the controlling, if not the sole, factor in the determination of the number of votes which would be accredited to a single political sovereignty. Amplifying the proposal, the British Government suggested that not more than one vote should be claimed in respect of the British non-self-governing colonies, protectorates, etc., it being understood that the British Government itself and the government of each of the self-governing dominions and British India should be given votes. The exact number of votes which it would be possible for a single government to obtain under this proposal was never definitely stated, though the number would certainly be very large.

No other general plan for the revision of Article 12 having been proposed, the British proposal formed the basis of the discussion in the subcommittee of the Convention Committee. The debate on the proper distribution of votes extended over several days, during which exceedingly divergent views were expressed. Among other suggestions was one by Dr. Wang, head of

[28] At the second plenary session, Oct. 25, Germany was granted the right to cast six votes. Executive B, p. 136.

[29] Article 22. [30] Proposal No. 105a. [31] Proposals Nos. 100, 101, 138–140.

the Chinese delegation, which would have given to each country a number of votes conditioned upon its importance in the field of radio communication, as determined by the number of radio messages in the international service originating in its territory within a specified time. Shortly after this, the United States delegation declared itself absolutely opposed to the British proposal, and indicated that it was prepared to accept as an alternative, either a system of plural votes worked out along the lines of the suggestion made by Dr. Wang or a plan under which each contracting government should receive only one vote, the term "contracting government" being narrowly defined. Finding agreement in full committee or subcommittee difficult, the delegations represented passed on to the consideration of subsequent articles.

A series of informal conferences followed, as a result of which it was decided to suppress Article 12 of the London Convention, to make no provision whatever for votes, and to leave the question of votes to be settled by the foreign offices prior to the next conference, or, failing that, by the next conference itself. The conference followed this decision.

This action called for a further decision. Various units which normally would not be considered as properly parties to an international agreement[32] were, in accordance with the terms of the London Convention, participating in the conference. The decision to abolish the unusual situation created by the London Convention gave rise to the question whether the delegates representing these units were entitled to sign the convention embodying the work of the conference. A special subcommittee of the Convention Committee, presided over by Mr. W. R. Castle, Assistant Secretary of State and member of the United States delegation, was appointed to consider the question. This subcommittee decided that as the London Convention determined the composition of the Washington Conference, the latter had no authority to refuse to any participating government the right to sign the documents adopted by the conference.[33] The course recommended by the subcommittee was adopted by the committee and followed by the conference. To forestall complications in future conferences, a statement was inserted in the *procès verbal* of the seventh plenary session, November 19, to the effect that the manner of signing the convention and regulations should have no effect whatever on the question of votes. A similar declaration was made in connection with Article 16, relating to adherences to the convention.[34]

THE CORTINA REPORT ON CODE LANGUAGE

The Paris Telegraph Conference of 1925 created a special committee for the study of the question of code language, which met at Cortina d'Ampezzo, Italy, from August 2 to August 26 of the next year. The committee's re-

[32] Compare the list of signatories given in footnote 2.

[33] *Procès verbal* of meeting of Subcommittee on Signatures, Nov. 15.

[34] *Procès verbal* of seventh plenary session, Nov. 19; Executive B, p. 235.

port, according to the resolution passed by the Paris Conference on October 17, 1925, was to be "submitted to the examination and decision of the first telegraph or radiotelegraph conference following the conclusion of the labors of the Committee."

The Cortina Conference issued a majority report signed by fourteen countries and a minority report signed by one.[35] The fundamental difference between the two reports was that the former favored a five letter code word with a rate coefficient to be determined, while the latter preferred the retention of the ten letter code word with certain modifications.

In accordance with a request transmitted by the French Government in its capacity as manager of the Telegraph Union, the Government of the United States issued invitations to the interested countries to send delegates to the Washington Conference empowered to consider and dispose of the Cortina Report. These delegates composed Committee No. 5 in the list of committees of the conference.

The first question considered by that committee at its opening session on October 11 was whether it was sitting as a part of the Washington Radiotelegraph Conference or, with the consent of the United States, as an entirely distinct Telegraph Conference. After some discussion the chairman, Mr. Gneme, head of the Italian delegation, concluded that the committee must proceed as a special Telegraph Conference, convened in Washington with the consent of the Government of the United States. This ruling was accepted by the committee, and rules modeled on those of the Paris Conference were adopted to govern the work of the newly created Telegraph Conference. After further debate on the constitution of the conference, the meeting adjourned in order that formal notification of the opening of the Telegraph Conference might be given to all the nations represented at Washington.

Two days later, October 13, the first plenary session of the Telegraph Conference was held. Immediately upon the opening of the session the British delegation made a declaration challenging the existence of the conference, on the ground that the conference had not been established in conformity with the provisions of the Telegraph Convention. The French delegation agreed with this view because the Paris Conference had decided that the next Telegraph Conference would be held in Brussels in 1930, and Article 88 of the regulations while permitting the date to be advanced, did not permit a change in the place of meeting. Other delegations expressed the fear that a difference of opinion as to the validity of the decisions reached by the conference might imperil the eventual solution of the entire question of code language.

As its final action, the committee decided to report to the Washington Conference that (a) the question of code language could not be treated as a matter pertaining to the International Radiotelegraph Conference of Wash-

[35] Great Britain.

ington; (b) that the telegraph delegations present at Washington could not organize themselves into an International Telegraph Conference in view of the provisions of Article 15 of the St. Petersburg Convention; and (c) that it was desirable that the date of the Brussels Conference be advanced from 1930 to 1928 for the sole purpose of the study of code language. The British delegation abstained from voting on paragraph (c).

The report of the committee was presented to the fourth plenary session, November 10, at which time the head of the Belgian delegation read a telegram from his government authorizing him to declare that the Belgian Government was willing to advance the date of the Brussels Conference to 1928. The British delegation objected to advancement of the date of the conference, stating that the matter deserved further consideration. At the suggestion of the President, the conference adopted the report of the committee and postponed the decision to be taken with regard to the Telegraph Conference. Later in the same session, the chairman of the Italian delegation stated that in his opinion the date for the Telegraph Conference was not within the province of the Radiotelegraph-Conference; that the normal procedure would be to inform the French administration as manager of the Telegraph Union of the recommendation of the Washington Conference and to request it to communicate with the Belgian Government. This course was followed by the conference.

THE CONVENTION AND REGULATIONS

Although the article setting out definitions is the first in the convention,[36] it was among the last adopted. Terms were used with an understanding of their general meaning, and near the end of the conference a special subcommittee was charged with the duty of defining terms in the sense in which they had been used. The definitions in the convention are supplemented by additional definitions in the general regulations, each group defining terms used in the document in which it appears. Of the convention definitions probably the most interesting is that of "radio communication," which is defined to apply "to the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds by means of Hertzian waves." As this definition indicates, the title of the convention does not reveal its extent. Although the document is called a "Radiotelegraph Convention," its provisions were written to apply not only to radiotelegraphy but also to radiotelephony, facsimile transmissions, and all other radio transmissions by means

[36] As has been stated, the conference took the London Convention and Regulations as the basis for its labors. Consequently, the articles coming from the various committees bore numbers corresponding to those in the London documents. This numbering was retained by the plenary session, the Berne Bureau being charged with renumbering the articles and writing titles. (See *procès verbal* of ninth plenary session, Nov. 25; Executive B, p. 279.) In the succeeding pages the numbers assigned to the articles are those which will be given by the Berne Bureau; the numbers in parentheses are those designating the articles in the convention and regulations as signed.

of Hertzian waves. Another definition bearing upon the scope of the convention is that of "international service," which, after including services that are strictly international, continues: "An internal or national radio communication service which is likely to cause interference with other services outside the limits of the country in which it operates is considered as an international service from the viewpoint of interference."

Article 2 (Article 1) defines the scope of the convention. In the first paragraph the contracting governments undertake to apply the convention to all radio communication stations established or operated by them, open to the international service of public correspondence, as well as to special services covered by the regulations. These special services are defined in Article 1 of the general regulations as "services of radiobeacons, radiocompasses, transmissions of time signals, notices to navigators, standard waves, transmissions having a scientific object, etc." By paragraph 2 they further agree to take or to propose to their respective legislatures the necessary measures to impose the observance of the provisions of the convention and regulations upon individuals and private enterprises authorized to establish and operate radio communication stations in international service, whether or not open to public correspondence.[37] Paragraph 3 recognizes the right of two contracting governments to organize radio communications between themselves within certain limits.[38]

The difference between the scope of the 1912 and 1927 conventions is readily apparent. While the provisions of the earlier treaty applied only to

[37] Over the objection of the United States, this paragraph as reported out of the Convention Committee imposed upon the contracting parties a similar obligation with regard to "individual and private enterprises authorized to establish and operate radio communication stations whether or not open to the international service of public correspondence." Such a provision would have made the convention and regulations applicable to all radio communication stations, regardless of the service in which they were engaged. The conference at the second plenary session, Oct. 25, changed the paragraph into its present form; but in order to protect international communications from interference set up by stations engaged in national service, the term international service was extended to include such interference. Executive B, p. 137.

[38] The Convention Committee at its second meeting, Oct. 11, adopted a fourth paragraph in which the contracting governments agreed to exchange traffic with properly authorized private enterprises. Upon further consideration in the Subcommittee of the Convention Committee, the government administrations represented were of the opinion that the paragraph lacked mutuality; and an amended paragraph was suggested to the effect that all of the contracting parties would refuse to exchange traffic with a private enterprise that declined to deal with a government administration for the sole reason that the latter was an administration. This new provision was believed by the United States and other countries in which radio communication is conducted by private enterprises to deal too severely with such an offending company. It was finally decided to eliminate the paragraph, a decision which was reached the more readily because it was believed that no administration or private enterprise respectively would give as the sole reason for refusing to deal with a private enterprise or administration the private or public character of the latter. (Sixth session of the Subcommittee of the Convention Committee, Oct. 25.)

stations in the maritime mobile service,[39] the later one has the enlarged scope just indicated. The necessity for enlarging the scope of the 1912 convention was in a large measure responsible for the convening of the Washington Conference; the changes made merely reflect the progress of the radio art.

Article 3 (Article 3) is largely a repetition of provisions in the 1912 convention. The first paragraph relating to the organization of the service of, and the determination of the correspondence to be exchanged by, fixed stations is carried over from Article 21 of the London Convention. That part of paragraph 2 subjecting fixed stations when engaged in international service from country to country to the appropriate provisions of the convention and regulations is new, though that referring to correspondence with stations in the mobile service is not. Paragraph 3 makes obligatory the reciprocal exchange of radiotelegrams by stations in the mobile service, without regard to the radio system employed by those stations. It was largely for the purpose of obtaining the insertion of a provision similar to this that the Berlin Conference was called in 1906. It appears in both the Berlin and London Conventions. A fourth paragraph, found also in the London Convention, states that in order not to impede scientific progress the preceding paragraphs shall not prevent the eventual use of a radio system incapable of communicating with other systems, provided that this incapacity be due to the specific nature of that system and not the result of devices adopted solely to prevent intercommunication. Article 4 (Article 4) further limits the application of Article 3 by providing that notwithstanding the provisions of the latter article, a station may be assigned to a limited international service of public correspondence determined by the purpose of the correspondence or by other circumstances independent of the system employed.

Article 5 (Article 4 *bis*) is designed to insure the secrecy of radio correspondence.[40] The commitment of the governments in this article is not very extensive, but it is the most stringent upon which agreement could be reached. The Convention Committee clearly recognized that the agreement by the contracting governments "to take or to propose to their respective legislatures the necessary measures to prevent," etc., was one which could easily be made of no effect by any government so desiring. It was felt, however, that the contracting parties could be relied upon to carry out the spirit of the article, within the limits of their powers.

The specific acts to be prevented are (a) the unauthorized transmission and

[39] Article 1. The provisions relating to interference and distress had a wider scope. See Article 15.

[40] The debate on this article revealed the difference between the position of the United States and that of a number of European countries in the matter of licensing of receiving sets. The United States Government has never attempted to require any such license, and the American delegation was continually on the alert to prevent the insertion of any provision in the convention or the regulations which would compel it to do so.

reception by means of radio installations of correspondence of a private nature; (b) the unauthorized divulging of the contents, or even of the existence, of correspondence intercepted by means of radio installations; (c) the unauthorized publication or use of correspondence received by means of radio installations; and (d) the transmission or the placing in circulation of false or deceptive distress signals or distress calls. The London Convention contains no similar provision.

By the terms of Article 6 (Article 4 *ter*) the contracting governments undertake to assist each other by supplying information concerning violations of the convention and regulations, as well as, if necessary, in the prosecution of persons violating the provisions of these documents. This article, likewise, has no parallel in the London Convention.

Article 7 (Article 5) of the Washington Convention has the same purport as Article 5 of the London Convention. The earlier convention bound the contracting governments to connect coast stations with the telegraph network of the country, or at least to take other measures to insure a rapid exchange between coast stations and the telegraph system. It was clearly impossible for a government situated as that of the United States to fulfill the obligation to connect the coast stations with the telegraph system. In the Washington Convention, therefore, the provision was altered to bind the contracting governments to take the necessary measures in order that such connections be made, or at least to take steps to assure rapid and direct exchanges between land stations and the general communication system. It will be noted that the Washington Convention differs from the London Convention in that it requires the connection to be with the general communication system, whereas the London Convention merely required connection with the telegraph system.

Article 8 (Article 6) makes the International Bureau of the Telegraph Union the intermediary between the contracting governments in the furnishing of the names of stations engaged in the international service of public correspondence, of the names of stations carrying on public correspondence, of the names of stations carrying on special services, and of all data for facilitating and expediting radio communication. This article is expanded by the provisions of Article 13 of the general regulations; it is an enlargement of Article 6 of the London Convention, responsive to the enlarged scope of the new convention.

Article 9 (Article 7) is a reservation of the right of each of the contracting governments to permit in the stations mentioned in the preceding article the establishment and operation of devices, other than those covered by the data to be published in accordance with that article, for special radio transmission. It is practically identical with Article 7 of the London Convention.

Article 10 (Article 8) contains a statement of the ideal sought in international radio service. "The stations covered by Article 2 (Article 1) must,

so far as practicable, be established and operated under the best conditions known to the practice of the service and must be maintained abreast of scientific and technical progress." Delegates from a number of the smaller countries kept constantly before the conference the fact that radio apparatus is expensive, and that in view of the rapid development of the art, installations comparatively new in point of time may soon not be the most efficient developed. The phrase "so far as practicable" was inserted to cover this situation; it is to be hoped that it will not be extended to permit the continuance in operation of an antiquated and inefficient station whose activities constitute a disturbance to a large number of more modern and more efficient stations.

The article is completed by a second paragraph to the effect that all stations, whatever their purpose, must, so far as practicable, be established and operated so as not to interfere with radio communications or services authorized by one of the contracting governments. It is to be noted that this paragraph applies not only to the stations covered in Article 2 (Article 1), but also to those stations, including naval and military installations, with regard to which liberty is reserved by Article 22 (Article 21). The article corresponds to Article 8 of the London Convention, but it so far expands that article that the resemblance between the two is slight indeed.

Article 11 (Article 9) relative to priority for distress calls is identical with Article 9 of the London Convention. Article 12 (Article 10) contains the only reference which the convention makes to charges. It differs from Article 10 of the London Convention (upon which the United States reserved at the time of signing) in that all details concerning charges are left to the regulations. Detailed provisions concerning charges are contained in two articles of the regulations (numbered 24 and 33 in the draft adopted by the conference), both of which at the request of the United States were inserted in the supplementary regulations.[41]

In Article 13 (Article 11) official recognition is accorded to the division of the regulations into two parts—general regulations which have the same force and go into effect at the same time as the convention, and supplementary regulations which bind only the governments which have signed them. Only the United States, Canada and Honduras did not sign the supplementary regulations, so that if ratification follows signature in all cases, the supplementary regulations will be effective among by far the larger number of parties to the convention.

The second paragraph of this article, making provision for the alteration of the convention and regulations, corresponds to Article 11 of the London Convention with some important changes. Under the Washington Convention changes may be made only by conferences of plenipotentiaries of the

[41] In accordance with a statement made by the American delegation at the seventh plenary session, reference in the convention to articles in the supplementary regulations is not binding upon the United States. Executive B, p. 240.

contracting governments, each conference fixing the time and place of the next meeting.[42] The London Convention had also a provision for the modification of the convention and regulations between conferences by common consent. With the deletion of the article relating to votes, and the understanding that the entire question of votes would be settled before the next conference, the deletion of the provision for amendments between conferences necessarily followed. Article 13 also carries a third paragraph, without precedent in the London Convention, stating that before any deliberation, each conference shall establish rules of procedure to govern debate.

In Article 14 (Article 12 *bis*) the contracting governments reserve for themselves and for private enterprises duly authorized by them, the right to make special arrangements on matters of service which do not affect the governments generally, on the condition that such arrangements must be in conformity with the convention and regulations so far as concerns interference which their execution might produce with the services of other countries. No similar provision occurs in the London Convention.

In Article 15 (Article 12 *ter*) each government reserves the right to suspend international radio communication service for an indefinite period either generally or only for certain connections or certain kinds of radio communication, provided that it immediately so advise the other contracting governments through the intermediary of the International Bureau.

The first paragraph of Article 16 (Article 13) relating to the duties of the International Bureau is almost identical with the corresponding paragraph of Article 13 of the London Convention, the changes being responsive to the enlarged scope of the new convention. The second paragraph of the article provides for the expenses of the bureau and the manner in which they are to be borne. It is completed by Article 34 (Article A49) of the general regulations, which follows Article 84 of the Telegraph Regulations rather than Article 43 of the London Regulations. Unlike the Telegraph Regulations, the Washington Radio Regulations do not assign the contracting governments to particular classes for the payment of expenses, but leave each government to notify the International Bureau of the class in which it desires to be placed.

Article 17 (Article 13 *bis*) of the convention is entirely new, the subject matter of the article having caused one of the most prolonged debates in the conference. It provides that an International Technical Consulting Committee on Radio Communications shall be established for the purpose of studying technical and related questions pertaining to these communications. This provision is amplified by Article 33 (Article 34) of the regulations. There it is specifically stated that the functions of the committee are limited to giving advice on questions which shall have been submitted to it

[42] The conference at the eighth plenary session, Nov. 22, accepted the invitation of the Spanish Government to hold the next conference in Madrid, and set the date for 1932. Executive B, p. 274.

by the participating administrations or private enterprises, and which it shall have studied. This advice is to be transmitted to the International Bureau with a view to its being communicated to the administrations and private enterprises concerned. The opposition to the establishment of the committee was based on the fear that it might develop into a supercommittee which might tend to stifle radio development. Agreement upon the creation of the committee was obtained by the limitation of its functions to a strictly advisory character.

After the question of the creation of the committee and of its powers had been disposed of, the contest centered on its composition. Countries in which radio communication is a government function felt that the dignity and authority of the committee would be impaired if representatives of private enterprises were accorded the full rights and powers granted to representatives of the administrations. They recognized the importance of having representatives of the large radio communication companies at the meetings of the committee, but they wished this presence to be in an advisory character only without carrying with it a vote in the determination of the decisions of the committee. Such a system, however, would have deprived the United States and other countries not operating their radio communication systems of any effective participation in the work of the committee. This situation, reënforced by the desire of the contracting governments to obtain the advice of the technical experts to be found in the employment of American companies, led to a compromise embodied in Article 33 of the regulations. It is there provided that the committee shall be formed, for each meeting, of experts of the administrations and authorized private companies who wish to participate in the work of the committee. Experts of the private companies participate in the work in an advisory capacity. When, however, a country is not represented by an administration, the experts of the authorized private enterprises of that country have the right to cast a single vote. Expenses of any meeting are to be borne in equal parts by the administrations and private companies participating therein; personal expenses of the experts are to be borne by the administrations or private enterprises which appointed them.

The administration of the Netherlands is charged by Article 33 with organizing the first meeting of the committee, and of drawing up its program of work.[43] Thereafter, the administrations represented at any meeting are to designate the administration which shall call the following meeting. Questions to be studied by the committee are to be sent to the administration organizing the next meeting, and this administration shall fix the date and program of that meeting. While no regular schedule of meetings of the committee is designated in the regulations, it is provided that in principle these meetings shall take place every two years.

[43] At the sixth plenary session, Nov. 18, the Netherlands delegation announced that the first meeting of the committee would be at The Hague. Executive B, p. 229.

Article 18 (Article 14), which declares that each of the contracting governments shall determine the conditions under which it will accept telegrams or radiotelegrams originating in or destined to a station not subject to the provisions of the convention, is almost identical with the first part of Article 14 of the London Convention. The article further provides that if the message is accepted, it must be transmitted and the usual charges applied to it; in the corresponding part of the London Convention nothing was said of the obligation to transmit, though the provision relative to charges is contained therein.

Article 19 (Article 16), authorizing the adherence to the convention of non-contracting governments and stating the effect of adherence and denunciation upon colonies, etc., is identical with Article 16 of the London Convention, except that the later provision treats of "colonies, protectorates, or territories under sovereignty or mandate" while the earlier one listed "colonies, possessions, or protectorates."

Article 20 (Article 18) is devoted to the arbitration of disputes regarding the interpretation or execution of the provisions of the convention or regulations. In addition to rearranging and rewriting the provisions of Article 18 of the London Convention, the conference wrote into the new document one departure from the older one, namely the provision for compulsory arbitration. While the change was opposed, there can be no doubt that the new provision is responsive to the desires of a large majority of the contracting governments.[44]

Article 21 (Article 20) differs from Article 20 of the London Convention only in providing that regulations as well as laws relating to the object of the convention shall be exchanged and that the exchange shall be through the intermediary of the International Bureau.

In Article 22 (Article 21) each of the contracting governments reserves its liberty regarding radio installations not covered in Article 2 (Article 1), and especially with reference to naval and military installations. It is further provided that, so far as practicable, these installations must comply with the provisions of the regulations regarding assistance to be given in case of distress and measures to be taken to avoid interference. To this point the article closely resembles Article 21 of the London Convention. The 1927 convention, however, proceeds to state that they must also, so far as practicable, observe the provisions concerning the types of waves and the frequencies to be used, according to the type of service which these stations carry on. The subject matter of this latter provision is more recent than the 1912 convention. Article 22 carries a further concession in the interests of efficient international radio communication in a third para-

[44] Opposition to compulsory arbitration was led by Great Britain and Japan. A British motion to eliminate the compulsory feature was defeated 43 to 7, and the article with the provision for compulsory arbitration was adopted, 38 to 10. See *procès verbal* of seventh plenary session, Nov. 19; Executive B, pp. 237, 238.

graph which obligates these stations when used for public correspondence or for special services, to conform, in general, to the provisions of the regulations for the conduct of these services. That portion of Article 21 of the London Convention which deals with fixed stations has its counterpart in paragraph 1 of Article 3 of the Washington Convention, no corresponding provision being carried in Article 22.

Articles 23 and 24 (Articles 22 and 23) are formal articles dealing with the time the convention shall go into effect, its duration, and ratification. The effective date of the convention is fixed at January 1, 1929, and the place of deposit of ratifications at Washington; otherwise Articles 22 and 23 of the London Convention are almost unchanged.

The general regulations annexed to the convention are composed of 34 articles and 8 appendices taking up more than 67 pages, as against 24 articles of the convention filling 9 pages. The provisions are largely of a technical nature, of interest primarily to telegraph operators. Extensive changes have been made in the London Regulations.

Probably the most important of the new provisions of the regulations is that contained in Article 5 relating to the allocation of frequencies. The principle of allocation of frequencies to services, not countries, was followed, and an elaborate table showing this allocation was incorporated into the article. Beginning with frequencies in the band 10–100 kilocycles per second (30,000–3,000 meters), the table shows the allocation of frequencies up to 60,000 kc/s (5 m.), with only two bands unreserved. Above the latter figure, frequency bands are unreserved.

Another important decision incorporated into the regulations is that for the eventual abolition of damped waves. Generally, the use of damped waves of a frequency of less than 375 kc/s (wave length above 800 m.) is forbidden beginning January 1, 1930; no new installations of damped wave transmitters (spark sets), except low-power transmitters, may be made in ships or aircraft beginning at the same date; the use of damped waves of all frequencies is forbidden beginning January 1, 1940, except for the low-power transmitters mentioned above; no new installations of damped wave transmitters may be made in land or fixed stations henceforth; and waves of this type are forbidden in all land stations beginning January 1, 1935. (Article 5, paragraph 8 and Article 16 [18], paragraph 1.)

The supplementary regulations are few in number, consisting of but six articles and one appendix. For the most part these relate either to raidotelegraph charges or to the procedure to be followed in radiotelephony. The Government of the United States has consistently refused to attempt to regulate charges to be applied in the radio communication service. The reason for the insertion of the article and appendix regarding radiotelephony in the supplementary regulations was the belief that the service has not yet developed to the point where specific detailed regulation is desirable. Two other articles relate to priority of communications (a part of this article

appears as Article 23 of the general regulations) and to ocean letters. The remaining article provides that the International Telegraph Convention and annexed regulations shall be applicable to radiotelegrams in so far as they are not inconsistent with the International Radiotelegraph Convention and regulations. In part it corresponds to Article 50 of the London Regulations.

One of the committees of the conference devoted its entire time to a study of the International Code of Signals. Though its labors constituted an important part of the work of the conference, the conclusions of the committee have been incorporated in another document and do not appear in the convention or regulations.[45] In other cases also, careful work on the part of committees of the conference is not immediately apparent; as, for instance, in the delicate problem of preserving the proper relationship between the Radio Convention and the Convention for the Safety of Life at Sea and the Convention for the Regulation of Aerial Navigation.

An appreciation of the difficulties confronting the conference can be obtained from a careful study of the convention and regulations. Some of those difficulties appeared insurmountable even as late as the opening of the conference. The fact that the conference was a success is a tribute to the ability and earnestness of the delegates, and to the decision of their governments that a working basis for the conduct of the radio communications of the future must be found. The conference made no attempt to devise permanent regulations. It is believed that the fruit of its labors, not unduly restrictive of the progress of the radio art, will be a satisfactory guide for the period of approximately five years it is due to remain unchanged.

[45] Report of the chairman of the Committee on the International Code of Signals to the President of the International Radiotelegraph Conference, November 17, 1927.

THE LAND AND PETROLEUM LAWS OF MEXICO

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Of the Texas Bar

THE PETROLEUM QUESTION

The legal nature of property in mines has been the subject of much discussion, and varies, not only with the different systems of law, but also in different countries accepting the same legal system. In Roman law, the owner of the soil was theoretically considered to own all beneath the surface to the center of the earth, and all above it to the heavens, though there is considerable evidence that at one period of the Roman law the property in mines was separate from that of the surface. It is fairly certain, too, that the State was deemed to have an interest in mines and entitled to a portion of the profits.[1] Under the early civil law, gold and silver under public lands were considered to be the property of the Crown, while that under private land was considered to follow the ownership of the surface, subject to the payment of one-tenth of the profits to the prince.[2] At a later period it became the general doctrine over Europe that gold and silver under all lands was vested in the Crown, though in France the doctrine had little success.[3] This conception was particularly strong in Spain, where the ownership of mines in general vested in the Crown and did not pass even with a general grant.[4] An express grant was valid only for the lifetime of the granting sovereign. Private title to mines seems to have been recognized only through immemorial possession. John I granted one-third of the mines to the owner of the surface, but this grant was repealed by Phillip II, thus vesting the property in mines in the Crown again.[5] Under his decree, it was provided that natives and foreigners alike might work the mines and gain property in them as absolute as could be done with any other subject. However, certain payments to the Crown were required. Under the English common law, mines of gold and silver, though found on private property, were the exclusive property of the Crown, by virtue of the royal prerogative.[6] The title was such that gold and silver did not pass under the designation of "lands and mines" in a general grant.[7] Under the common law as under-

[1] Mispoulet, *Le Régime des Mines à l'Epoque Romaine et au Moyen Age*, Paris, 1908, pp. 62–65. See also p. 54.

[2] Rockwell's Spanish and Mexican Law, N. Y., 1851, pp. 124–125.

[3] Planiol, *Droit Civil* (8e éd., 1920), No. 2392.

[4] Rockwell, *op. cit.*, 126.

[5] Hall, The Laws of Mexico (1885), pp. 356–357.

[6] Case of the Mines (1568), 1 Plowden 310.

[7] Bainbridge *v.* Esquimalt, etc. Ry. (1894), 4 B. C. 181.

stood in the United States, the title to mines is *prima facie* in the owner of the soil.[8]

The reason generally assigned in support of the Crown's right to gold and silver was its requirement for the coining of money and to furnish an army for the protection of the realm.[9] This same reasoning (*i.e.*, necessity for the protection of the realm) finds its modern counterpart in the division of minerals into categories by modern civil law countries. The tendency towards classification is particularly pronounced in Latin-American countries, and it is usual even in those classifications which are considered to be the property of the surface owner for his property in the subsoil to be conditional on certain payments to the State.[10] The present-day importance of petroleum on matters of national defense makes it quite as necessary to modern nations as gold was to the ancient monarch.[11]

The mining laws of Mexico came originally in the form of decrees from the Spanish Crown known as *Leyes de Indias*.[12] While there is some doubt as to whether or not mines in the New World were considered as private property or as vested in the Crown, the latter view seems best borne out by reason and evidence.[13] In the *Nueva Recopilación de las Leyes de Indias*, property in the mines, including "bitumen and juices (jugos) of the earth," was reserved to the Crown.[14] Charles III in 1783 issued a decree giving his vassals the right to possess and transfer the property in mines under certain conditions, but expressly reserving that they were not thereby to be separated from the royal patrimony.[15] The colonial laws continued in force to a large extent even after the declaration of independence in 1821. The first change of any importance was that made by the Constitution of 1857 placing control of the mining industry in the various states. This proving unsatisfactory, a constitutional modification was made under which the first Federal Mining Code was promulgated in 1884.[16] This code in its classification of minerals

[8] 40 Corpus Juris, 758.

[9] Case of the Mines, *supra*.

[10] The laws and codes are collected in Thompson, Petroleum Laws of All America, Washington, Govt. Printing Off., 1921, p. 490 *et. seq.* *See also*, Holding of Real Estate and Acquisition of Mines, etc. by Aliens in Foreign Countries, Great Britain, Foreign Office, 1922; and Velarde, *Historia del Derecho de Mineria etc.*, Buenos Aires (1919), 146, 163, 180, 198.

[11] See Ise, The United States Oil Policy, New Haven, 1926, p. 478; and the British Petroleum Production Act of 1918 (Chitty's Statutes, 6th ed., 949); French Finance Act (not yet passed the Senate), April 4, 1926, Art. 53 (Dalloz, *Receuil Périodique et Critique*, 1926, 4e partie, p. 163); Spanish measures reported in United States Daily, Nov. 12, 1927, p. 1, col. 3; Norwegian Law of 1906 (34 Clunet, 983).

[12] For a short history of the position of petroleum in the Mexican mining laws see Santanella, "*El Derecho Sobre el Petroleo*," in *La Industria Petrolera*, Mexico, *Poder Ejecutivo Federal*, 1919.

[13] Rockwell, *op. cit.*, 129.

[14] Colarno, J., *La Ley Mexicana del Petroleo y su Reglamento*, Mexico, 1926. (Mimeograph), p. 3.

[15] *Idem.*, p. 3; Rockwell, *op. cit.*, 49.

[16] An English translation is found in Hall, *op. cit.*, App. III.

placed petroleum with those minerals which were the exclusive property of the owner of the soil. The later code of 1892 [17] did not mention "property," but merely declared petroleum to be one of the mineral substances which might be freely exploited by the owner of the surface. In 1909 [18] another code was passed, again declaring the property in mineral oils to be in the surface owner. This was the code in effect when the Constitution of 1917 came into being.

Prior to the promulgation of the Organic Law and its Regulations, presidential decrees of July 31 and August 8 and 12, 1918, attempted to put into effect portions of Article XXVII [19] relating to petroleum. Upon the refusal of some of the foreign companies to comply with the decrees, certain of their holdings were "denounced" as "free" lands. This led to the decisions of the Supreme Court generally referred to as the "Amparo Cases," [20] which held in effect that Article XXVII was not retroactive in so far as petroleum rights were concerned and did not apply to such rights acquired prior to May 1, 1917. The existence of such prior rights in petroleum might be shown, according to the court, by certain enumerated "positive acts" manifesting an intention to reduce the petroleum to possession. So also, the cases where such an intent was mentioned in, or manifest from, the contract claimed under. Under Mexican constitutional law, five decisions in cases with like facts are required to constitute "jurisprudence," *i.e.*, a decision binding on the court in future cases. Due to the peculiar legal system of Mexico, too much stress should not be placed on the decision of the Supreme Court in the Texas Company Case, though it was followed by four other similar cases and thus constitutes "jurisprudence," for the court is not bound to follow those decisions in cases arising under the laws passed in 1926.[21]

A more important factor occurring before the promulgation of the laws was the result of the United States-Mexican Commission convened in Mexico City on May 14, 1923. Messrs. Payne and Warren met with Srs. Ross and Roa for a discussion of the outstanding differences between the two governments at that time. A series of meetings resulted in a Special and a General Claims Convention, and statements by the representatives at a formal meeting on August 2nd, of the positions of their respective governments. It was stated by the Mexican Commissioners that the executive, by virtue of

[17] Velarde, *op. cit.*, pp. 132–133.

[18] The law is translated in Wheless, Compendium of the Laws of Mexico, St. Louis, 1910, p. 570. See also p. 981.

[19] See this JOURNAL Vol. XXI, p. 685.

[20] Texas Co. of Mexico, S. A. *v.* Secretaria de Industria et al., 9 *Seminario Judicial*, 432; International Petroleum Co. *v.* Agente de Petroleo, 10 *Sem. Jud.* 1189; Tamiahua Pet. Co. *v.* Sec. de Indus. et al., 10 *Sem. Jud.* 1190; *id.*, 10 *Sem. Jud.* 1190; International Pet. Co. *v.* Sec. de Indus. et al., 10 *Sem. Jud.* 886.

[21] For an explanation of the Mexican practice see "The Writ of Amparo Under Mexican Law," by Associate Justice Benito Flores, 7 Journ. Amer. Bar Assn. 388, and Schuster, "The Texas Company's Amparo Case," 7 *id.*, 583.

his duty to support the judicial department, would continue to give effect to the principles announced in the Texas Company Case, declaring Article XXVII not retroactive in respect to those persons who had performed "positive acts" demonstrative of an intention to reduce the petroleum to possession. These acts were enumerated as:

> drilling, leasing, entering into any contract relative to the subsoil, making investments of capital in lands for the purpose of obtaining the oil in the subsoil, carrying out works of exploitation and exploration of the subsoil, and in cases where from the contract relative to the subsoil it appears that the grantors fixed and received a price higher than would have been paid for the surface of the land because it was purchased for the purpose of looking for oil and exploiting same if found; and, in general, performing or doing any other positive act, or manifesting an intention of a character similar to those heretofore described.

It was further stated that

> The above statement has constituted and will constitute in the future the policy of the Mexican Government, in respect to lands and the subsoil upon which, or in relation to which any of the above specified intentions have been manifested; and the Mexican Government will grant to the owners, assignees or other persons entitled to the rights to the oil, drilling permits on such lands, subject only to police regulations, sanitary regulations and measures for public order and the right of the Mexican Government to levy general taxes.[22]

Sections III and IV of the statement relate to the rights of those persons who failed to perform a "positive act" before May 1, 1917. It was stated that in conformity with the decisions of the President of January 17, 1920, and January 8, 1921, such persons would be allowed to obtain and use the oil in the subsoil to the exclusion of third parties having no title to the land or subsoil. These two sections are expressly stated not to constitute an obligation for an unlimited time.

The American Commissioners reserved the rights of the United States to make future claims arising out of the petroleum laws on behalf of their nationals, while the Mexican Commissioners reserved the rights of their government to deal with the lands upon which no "positive act" had been done.

It is contended by the United States that the published statements arising out of this meeting constitute an international obligation binding on the Mexican Government, and that putting into effect any law or decree contrary thereto would be tantamount to breach of a treaty obligation. Further, it is contended that the Petroleum Laws of 1926 violate that agreement. The Mexican Government denies that the statements of the Mexican Commissioners constitute anything more than "a statement of the purposes of President Obregon to adopt a policy which, although approved and followed

[22] Proceedings of the United States-Mexican Commission Convened at Mexico City, May 14, 1923, Department of State: Washington, D. C., especially pp. 47–48.

in its main points by the present President, cannot in any manner constitute a promise with the binding force of a treaty that the future Presidents must observe in all its details, and much less that it might bind the legislative power and the Supreme Court of Justice. . . ." It is said also that the reservations of Section V take from it any character of a synallagmatic agreement.[23] Certainly it was not a treaty, for there were no ratifications exchanged, and the highest force that may be attributed to it is that of an executive agreement. Cases have arisen before which involved the meaning and intent of arrangements made between nations other than by treaty, which have been decided by international tribunals.[24] The difference in opinion between the United States and Mexico as to the nature of the "agreements" entered into in 1923 are such as can only be solved by judicial decision. In the absence of such authoritative decision, it is impossible to reconcile the conflicting contentions of the parties. The unilateral determination of the meaning of the document in question would not be conclusive of its legal meaning.

"ACQUIRED RIGHTS" AND RETROACTIVE LEGISLATION

Coming now to the legislation of 1926,[25] we find the two governments in agreement on at least the following basic principles:

> (1) Rights of property of every description are to be respected and guaranteed in conformity with the recognized principles of international law and equity.
>
> (2) The principle that acquired rights may not be impaired by legislation retroactive in character or confiscatory in effect is not disputed. (Mexico reserves that mere retroactivity without injury is not objectionable.)

The agreement on these principles means little, however, when it is considered that there is no agreement on the "respect of private property" required by international law and equity, nor is there any on what constitutes an "acquired" right. The doctrine of "acquired" rights is a legacy of the political theory of the middle ages, and is part of the larger theory of "natural" rights, or rights having their foundation in the *ius gentium*, existing prior to the State and therefore beyond the power of the State to impair. Among these "natural" rights we find the "right of property," the inclusion of which in the "natural" rights was perhaps influenced by the very ancient beliefs in the close physical connection between the person and his property, vestiges of which are still apparent in the real property laws of some of our states today. It was considered by the thinkers of the middle ages that

[23] American Property Rights in Mexico, Department of State, Washington, 1926, pp. 10–13.

[24] *E.g.*, The Mavrommatis Concession Case (Great Britain *v.* Greece) decided by the Permanent Court of International Justice.

[25] For references to these laws see this JOURNAL, Vol. XXI, pp. 686–687.

those "acquired" or "vested" rights not having their foundation in the *ius gentium* were mere creatures of the State, and could, therefore, be revoked or modified by that power at will.[26] Nevertheless, during this period there grew up the theory of a sort of overlordship in the State with respect to lands within its boundaries. This theory gave birth to that of expropriation, by virtue of which the State was empowered for reasons of the public weal to take private property.[27] This power was restricted by the bounds of "good cause" and compensation. It is somewhat surprising to find at this time, when "natural rights" of the individual were first being proclaimed against the State, that there was a considerable body of legal opinion to the effect that when a statute was general and impersonal, or when necessity demanded it, compensation was not necessary.[28] The vast majority of the constitutions formulated before 1914 provide that property may not be taken for other than public purposes or necessity, and then only against adequate compensation. The doctrine that "property" is a "natural" right is implicit in most of them. It was expressly stated to be such in the French Declaration of the Rights of Man,[29] and a like statement is to be found in many of the older state constitutions of the United States.[30] The courts of the United States still speak of "natural" rights, and many cases have been decided on the assumption that such rights, embodied in the due process clause, exist prior to and above the State.[31]

Closely connected with the theory of acquired rights is that concerned with "retrospective" legislation. Since legislation which does not in some sense have retroactive effect is inconceivable, the term "retrospective" must have a technical meaning. Obviously, there is nothing objectionable in retroactive legislation *per se;* the difficulty arises only when it substantially injures rights previously acquired. The matter has been much discussed in recent times, and a vast amount of literature is available from theorists of the Civil Law attempting to define the terms.[32] Whether or not a statute is "retroactive" in the technical sense depends entirely on whether it interferes with "acquired" rights, so that the gist of the matter lies in the meaning of that

[26] Maitland's Gierke, Political Theories of the Middle Ages, Cambridge, 1900, pp. 74–79.

[27] *Id.*, Compare the English theory that the ultimate (allodial) tenure of all lands is in the Crown, the individual having only certain lesser tenures. See Allen, The Royal Prerogative in England, London, 1849, pp. 125–155.

[28] Gierke, *op. cit.*, pp. 80, 180, notes 276, 277.

[29] (1789), Art. 2. See also the Constitution of 1848, Art. 3.

[30] Maine, Art. I, Sec. 1; New Hampshire, Part I, Art. 2; Vermont, Chap. I, Art. 1; Massachusetts, Part I, Art. 1; Pennsylvania, Art. IX, Sec. 1.

[31] See the excellent study of Haines, "The Law of Nature in State and Federal Judicial Decisions" (1916), 25 Yale Law Journ. 617. See also Ritchie, Natural Rights, London, 1924, pp. 263–271.

[32] Notable examples are the two volume work of Lasalle, *Das System der Erworbenen Rechte*, Leipzig, 1861, and Gabba's work in four volumes, *Teoria della Retroattività delle Leggi*, Torino, 1891. See also the lengthy discussion of Savigny, *Römisches Recht*, Berlin, 1848, vii, pp. 381–514.

term. Many definitions have been offered, yet none is to be found which does not in the final analysis come to this: "An acquired right is a right which has been acquired."[33] Under the name of "vested" rights the subject has produced a large mass of jurisprudence in the courts of the United States, an examination of which discloses that a "vested" right is one to which the judicial department of the government is disposed to give protection at a given time. At different periods the disposition of the courts will vary; and with it the meaning of a "vested right."[34] Since in no single nation is there a legal definition of "acquired" or "vested" rights having anything like an accurately predictable content, it is difficult to see how there can exist such a definition in international law.

The rights in petroleum which have been the subject of difference between the two governments are divided into two classes: first, those rights which come within Article 14 of the Organic Law as having been established by a "positive act"; and second, those pertaining to individuals not having performed a "positive act" prior to May 1, 1917. As to acquisitions after that date there is no difference of opinion, the United States recognizing the right of Mexico to pass such laws with respect to future acquisitions.

As to the rights acquired prior to 1917, it is the position of the United States that persons coming into Mexico while the Constitution of 1857 and the Mining Codes of 1884, 1892, and 1909 were in effect, and purchasing land or executing leases thereunder, have "acquired" rights which cannot be injured or taken away without violation of the rules of international law. Mexico answers that "acquired" rights are not injured inasmuch as persons coming within Article 14 will have their titles respected by the issuance of a concession for fifty years. It is insisted that this is compatible with the Supreme Court decision to the effect that the petroleum division of Article XXVII of the Constitution is not retroactive, because every effect of the title in the past is recognized, and the only effect of the law is in the future, *i.e.*, on the extent *in futurum* of the right previously acquired.

As to the rights of persons not having performed the required "positive acts," it is maintained that they had not a "right," but a "mere expectancy," hence the law is not retrospective as to them, since it interferes with no "acquired right." In turn, the United States replies that granting a concession for fifty years is not a "recognition" of full title, and that those persons having performed no "positive act" did have "acquired" rights and not "mere expectancies." It is thus clear that no agreement can be had between the parties based on the elusive terms "acquired rights" or "retro-

[33] *E.g.*, Gierke, *Deutsches Privatrecht*, i, 192; Merlin, *Répertoire*, Paris, 1827, v, Sec. 3, p. 536; Baudry-Lacantinerie, *Précis de Droit Civil*, Paris, 1905, i, 28. See the interesting article on the conception of "vested rights" in the United States courts, by Bryant Smith, "Retroactive Laws and Vested Rights," 5 Tex. Law Rev. (1927), 231.

[34] 34 Yale Law Journ. (1925), 303. *Cf.* Munn *v.* Illinois (1876), 94 U. S. 113, and Tyson & Brother *v.* Banton (1926), 47 Sup. Ct. 426.

spective legislation." From the preceding discussion of these terms it seems clear that their use in attempting to solve questions of international law can serve only to obscure the basic issues.[35]

EFFECTS OF THE PETROLEUM LAW

Before discussing further the legal issues involved it will be necessary to review the facts and to determine, so far as is possible, what the actual operation is, or may be. The laws require that formal statements and presentation of claims be made within one year from the promulgation of the law under penalty of having all rights considered as renounced.[36] There is much conflict in the reports of how many companies accepted the new law and fulfilled its requirements.[37] It is certain, however, that a number of important companies did not accept and relied upon the interposition of their respective governments for the protection of their rights. Under municipal law, therefore, the titles of these latter companies have been divested by operation of law. Those companies are now seemingly in a position of absolute dependence upon the action of their governments unless the Supreme Court of Mexico declares the operative law unconstitutional. Prior declarations as to the meaning of the law from official and semi-official sources did not make completely clear the manner in which the law would be given effect. One statement, emanating from the Mexican Embassy in Washington, was to the effect that the law would not be applied to any of those persons holding titles acquired prior to 1917,[38] which is in conflict with some of the notes sent from the Mexican Government to the United States. The note of March 27, 1926, in reply to a specific question, stated clearly that the law would apply to rights obtained before 1917 as well as after, but that the fifty-year concessions might be renewed so that no real prejudice would exist. The time limit having passed for the confirmation of rights under the law, it has been given effect in several cases by the cancellation of drilling permits and the refusal to issue new ones to certain of the companies who failed to accept the law. These cases have been taken to the federal courts, and in several of them writs of *amparo* are reported to have been granted restraining the government from interfering with the operations of the companies. In other courts it seems that the writs have been refused. The cases will not be settled from a municipal standpoint, however, until a decision is made by the Supreme Court. Meanwhile, there is an apparent policy on the part of the Mexican Government not to interfere further with the operations of any of the companies.[39]

[35] American Property Rights, etc., *passim*.

[36] Art. 15, Organic Law.

[37] N. Y. Times, Jan. 22, Feb. 8, 17, 19, 1927.

[38] N. Y. Times, Dec. 3, 1926, p. 2.

[39] N. Y. Times, Jan. 26, 30, Feb. 3, 1927. It is reported that the Mexican Supreme Court has recently held that the cancellation of these permits was unconstitutional. However, the opinion has not yet been made public, so that no consideration can here be given to its effect.

In attempting to determine the extent of injury which might be done to owners of petroleum property it must be kept in mind that the peculiar and mobile nature of the substance over which dominion is attempted to be exercised requires considerations not present in the ordinary incidents of property in land. In the United States there are three theories as to the matter of property in petroleum, one acknowledging full ownership in the owner of the surface;[40] a second recognizes in the owner of the surface a defeasible ownership in the subsoil;[41] while a third line of cases recognizes in the owner of the surface no "property," but only the right to reduce to possession.[42] This latter view accords with that expressed by Mexico, the difference being in the amount of legal protection given to such a right.

The Government of the United States has in its correspondence with Mexico maintained the first theory of complete ownership, and for the purposes of this discussion that theory will be accepted. "Property," in its legal sense, has been defined by an American court as being "not the thing itself, but certain rights in and over the thing, those rights being: user, exclusion, disposition."[43] The property in which the petroleum companies are interested is property in the oil, the land being necessary only as a brace for their drilling apparatus. Assuming that such a company complied with the Mexican law and received a fifty-year concession, what has happened to their "property" in the petroleum? The right of user continues, but is limited to fifty years; the right of exclusion continues; the right of disposition is divided, *i.e.*, the petroleum when in place may not be disposed of, but from the moment it is reduced to possession it may be freely sold. Remembering the substance with which we are concerned, it is difficult to see how limiting the user to a period of fifty years would be actually detrimental to the owners. No oil well has been known to have so long a life. If, however, at the end of that period there still remains oil that may be taken, the concession may be extended or renewed as provided by Article 155 of the regulations. It has been said that this article is illegal inasmuch as sub-section II of Article 14 of the Organic law says that "confirmation of these rights may not be granted for more than fifty years, etc." That, of course, is a matter for the Mexican courts to settle, but in view of the fact that specific provision is made for renewal of all concessions without exception,[44] and the fact that there is no prohibition in the law against giving preference for future grants of concessions to holders of these fifty-year "confirmations," we are not warranted in assuming that the Mexican courts would decide that no such renewal or preference might be given. If all the oil be removed within fifty years, there is no actual loss at all. The restraint on future alienation, which interferes

[40] Texas Co. *v.* Daugherty (1915, Tex.), 176 S. W. 717.
[41] Westmoreland Gas Co. *v.* DeWitt (1889, Pa.), 18 Atl. 724.
[42] Ohio Oil Co. *v.* Indiana (1900), 177 U. S. 190.
[43] Dixon *v.* People (1897), 168 Ill. 179.
[44] Organic Law, Art. 8, Sec. VII.

somewhat with the former freedom of disposition, is an operation of the law which has never, even in Anglo-Saxon jurisprudence, been considered an interference with property beyond the power of the State.[45] No restraint is placed on the sale of such oil as is recovered, and the only injury possible in this connection is the inconvenience which might result to persons wishing to retire from the business in Mexico, or to persons who purchased the rights for speculative purposes.[46]

The essence of the injury, therefore, lies in the possibility that owners of rights over petroleum may be forced to exercise them or lose them. Under the law, exploitation is a condition to the continuance of the concession.[47] All that has been taken by the Mexican Government to date is the naked title.[48] This is thought by some to be a mere stepping-stone to further encroachments resulting finally in an actual confiscation of the oil. We are not permitted to say, however, that because act "A" makes possible act "B," which is illegal, act "A" must be considered illegal also. If future acts of the Mexican Government resulted in an actual confiscation, no reason is seen why Mexico would be relieved of responsibility for those acts.[49]

Viewed in another manner, the situation may be regarded as involving the exercise of "eminent domain" instead of the "police power," for eminent domain, reduced to its lowest terms, is but the change in *form* of property. From this point of view Mexico would be bound to make "adequate" compensation. The fifty-year concession would represent the compensation, the "adequateness" of which might occasion a difference of opinion.

The purpose of Mexico in nationalizing this part of her natural resources is recognized by the United States as legitimate, the method alone being in dispute.[50] That Mexico might expropriate entirely all the oil properties in Mexico against "adequate" compensation is not denied. This method of nationalizing the subsoil would have been far beyond the financial possibilities of Mexico, so it was necessary to devise some other method of reconciling the property rights of individuals and the legitimate purposes of the State. In view of the probable impossibility of arranging compensation for oil properties which would be accepted as "adequate" by the owners, the course pursued seems not to have been improper, particularly since actual pecuniary injury to private owners is still unproved. It must be admitted,

[45] Chaplin, Suspension of the Power of Alienation, N. Y., 1911, Secs. 20–21.

[46] A railroad in the United States may not because of its own desire retire from business. State of Texas *v.* Eastern Texas Ry. (1922), 258 U. S. 204; Atl. Coast Line *v.* No. Car. Comm. (1907), 206 U. S. 1. As to land purchased for speculative purposes, *see* Village of Euclid *v.* Ambler Realty Co. (1926), 272 U. S. 365.

[47] Arts. 69 and 141 of Regulations.

[48] Compare New York Public Lands Law, Art. VII, Sec. 80. *Cf.* The French Mining Law of 1810 (Art. 552 of Civil Code), Lengereau, *Essai sur la Nature Juridique de la Propriété Minière*, Toulouse, 1922, 15–35.

[49] The Delagoa Bay Railway Case, Moore, Int. Arbitrations, II, p. 1870.

[50] Mr. Kellogg to Sr. Saenz, January 28, 1927.

nonetheless, that it is an invasion of the interest of private individuals, and legal minds might differ on the legal effects of that invasion. It becomes then, from its nature, a purely legal question to be decided by an international court, applying general legal principles and those of international law to whatever facts may be proved.

No provision is made in the law for persons purchasing or leasing lands prior to May 1, 1917, and who have performed no "positive act." As to them, Mexico regards the interest acquired as a "mere expectancy," and as such not legally entitled to respect. The United States regards them as "acquired" rights in the same sense as those embodied in Article 14 of the Organic Law.[51] The policy of Mexico has been to give holders of these interests concessions in preference to third parties having no interest in the land, and there has been no indication that this policy is to be changed.[52] Under such procedure the rights involved would be governed by the same principles as were discussed above in connection with rights accompanied by a "positive act." If, however, the policy is changed and these interests extinguished, the element of actual damage is more apparent. Since the Mexican and American systems of law differ on the legal protection afforded such interests, the question must be settled by considerations of the protection afforded private property of aliens by international law. Certainly Mexico's contention that the interest was not an "acquired" right under her system of law would be ineffective before an arbitral tribunal, and in view of precedent it is doubtful if the total extinction of these valuable property interests would be upheld.[53]

The final position of the Government of the United States is stated by Secretary Kellogg to be that

> . . . it expects the Government of Mexico, in accordance with the true intent and purpose of the negotiations of 1923 . . . to respect in their entirety the acquired property rights of American citizens, which have been the subject of our discussion, and expects the Mexican Government not to take any action under the laws in question and the regulations issued in pursuance thereto, which would operate, either directly or indirectly, to deprive American citizens of the full ownership, use and enjoyment of the said properties and property rights.[54]

This statement of the right of property in absolute terms could hardly be supported under any present system of law, and is indicative of the width of the breach between the conceptions of state power held by the two governments.[55]

[51] American Property Rights, etc., pp. 5, 18–19.

[52] Presidential decisions (*acuerdos*) of Jan. 17, 1920, and Jan. 8, 1921.

[53] In every international case reviewed in this JOURNAL, Vol. XXI, p. 685, in which there was a *total extinction* of property interests, compensation was successfully demanded.

[54] American Property Rights, etc., 27.

[55] Compare the language of Holmes, J., dissenting in Tyson & Bro. *v.* Banton (1926), 47 Sup. Ct. 426, 433.

In summary it may be said that in so far as the petroleum legislation is concerned, much will depend on the manner in which the Mexican Government applies the laws. Upon this will depend the degree of actual loss sustained by owners of petroleum "rights." The final question is not whether the State may under international law interfere with private property interests of aliens, for that it may do so to a certain extent is beyond refutation. The real issue, broadly stated, is "How much of the private property interests of the alien may be taken by the State by a general impersonal law without compensation?"

THE AGRARIAN AND ALIEN LAND LAWS

One of the moving factors in the revolution of 1910 was the agrarian question.[56] Under the Diaz régime vast quantities of the public lands were, by methods legal and illegal, placed in the hands of individuals. This alienation of the public domain was accomplished by various means, and only in rare cases did the government receive adequate consideration, a great part of the land being disposed of *gratis*. Under pretext of applying the expropriation law of June 25, 1856,[57] the *ejidos* and other communal lands of the villages and communities were expropriated. During the following ten years most of these lands came into the hands of the large landed proprietors. By various methods, some 25% of the total area of Mexico passed into the patrimony of a few individuals and companies, many of them foreigners, who enjoyed peculiar privileges under the Diaz administration.[58] The decree of January 6, 1915,[59] which was incorporated into Article XXVII of the Constitution of 1917, was designed to restore these lands to the villages and communities. Under this decree a considerable amount of land belonging to foreigners was taken by illegal methods and without compensation, or with but nominal compensation. The arbitrary methods employed in the expropriation of this land were the subject of part of the discussions at the meetings of the United States-Mexican Commission in 1923. The American commissioners pointed out specific instances in which the domestic law had been flagrantly violated and American citizens arbitrarily dispossessed of their properties. That a considerable amount of illegal confiscation had been indulged in by the Mexican authorities was admitted by the Mexican Commissioners, who pleaded in defense the peculiar situation existing at

[56] For an excellent short history of the matter see Phipps, "Some Aspects of the Agrarian Question in Mexico," 1925, Univ. of Texas Bull. No. 2515.

[57] de Negri, *op. cit.*, 10. The Constitution of 1857 in its Art. XXVII forbade ecclesiastic and civil corporations to own land. By bringing the communes under the head of civil corporations it was possible to expropriate their lands "legally." *Collección de Leyes Sobre Tierros, Secretaria de Fomento*, Mexico, 1913, p. 16.

[58] Phipps, *op. cit.*, 108–109.

[59] de Negri, *Recopilación Agraria*, 1924, Mexico, 34. In English, C. W. Hackett, "The Mexican Revolution and the United States, 1910–1926," World Peace Foundation Pamphlet, Vol. IX, No. 5, 1926, p. 403.

that time in Mexico, it being said that only an immediate granting of lands to villages and communities made possible the continuance of peace.[60] Under the law, lands expropriated were to be paid for by twenty-year, 5% bonds, and the value of the land was to be determined by the owner's declaration of taxable value, to which was added 10% and the value of the improvements on the land. Both the method of valuation and that of payment were objected to by the American commissioners, it being said that nothing short of "full and fair" compensation would meet the demands of international law, which required also that the payments be made in cash at the time of the taking.[61] It was answered that inasmuch as the individuals owning the land had themselves made the statement as to the value of the land (they having been warned that such value would be the basis of an expropriation made, and opportunity being afterward given for changing the valuation), it was the fault of the individual and not of the Mexican Government if the value given was not a fair one. The payment in twenty-year bonds was defended on the ground of the internal exigencies of the State and the claim that the revenue from the bonds would be equivalent to the actual rental value of the land. The general argument that foreigners received the same treatment as nationals was also made. It was indicated, too, that the government was then negotiating a loan for the redemption of the bonds, and for that reason it was expected that they would have a market value. The unusual circumstances of the case were recognized by the American commissioners, and it was agreed that if Mexico would not consider it as a precedent for future actions, the American Government would take under advisement whether or not it would accept the federal bonds as payment for expropriated lands not exceeding 1,755 hectares from any one individual.[62] It was also presumed that the persons who had previously suffered injury because of the improper application of the laws would be able to present their claims under the claims conventions to be concluded. The matter has not since been the subject of diplomatic discussion, and whatever injuries may result from the law will no doubt be settled by the claims commissions now sitting. While the statement of the American commissioners that

> . . . The United States maintains that under the rules of international law there can be no taking of lands, water rights or other property of American citizens, in whatever form their interest may be held, legally

[60] Proceedings, etc., pp. 26, 32. See also the note of Sr. Pani to the American *Chargé d'affaires*, quoted *ibid.*, p. 28. Attention is also directed to the article of Col. J. C. Breckinridge, "Land Ownership in its Relation to Stability," The Annals of the Amer. Acad. of Pol. and Soc. Science, Nov. 1927, p. 207.

[61] *Ibid.* 29. The matter of requiring payment to be made in cash at the time of the taking is a doubtful one. See award of The Hague Court of Arbitration in United States *v.* Norway, this JOURNAL, Vol. XVII, pp. 362, 385, 386. *Cf.* Baty, International Law, N. Y., 1909, p. 85.

[62] Proceedings, etc., pp. 33, 34, 37. President Coolidge seems to have accepted this method of payment. N. Y. Times, April 26, 1927, p. 10, c. 6.

> acquired prior to May 1, 1917, under the laws of Mexico and the Constitution of 1857, without indemnification in cash at the time of the taking for the just value thereof.[63]

perhaps goes beyond what has been established by international practice, it seems fairly certain that payment of the fair value of the land taken within a reasonable time after the taking is required.[64] Payment in bonds issued against a treasury incapable of meeting them is not "payment," and payment within twenty years probably not payment within a reasonable time.[65] This seems to have been recognized by the Mexican commissioners, and also seems to have been recognized by other governments involved in similar situations.[66] The method of determining the fair value of the property varies under different legal systems, and it is usually considered that if the claimant has had opportunity to attack such valuation according to the municipal law, he has no grounds for international complaint unless the valuation is so flagrantly unfair as to amount to a denial of justice.[67] Whether or not the valuation made is a "denial of justice" is a question of fact for judicial determination. If *every* valuation placed on property by municipal administrative organs were subject to review not only in the municipal courts but also in the foreign offices of other nations, it is apparent that intolerable confusion and friction would result.

In a note dated March 1, 1926, addressed by Secretary Kellogg to Minister Saenz, a series of questions on the effect of the Alien Land Law were propounded.[68] These questions were answered in the note of Minister Saenz

[63] Proceedings, etc., p. 29.

[64] A similar question is raised in cases of moratory legislation affecting private contracts. During the Franco-Prussian war French legislation seriously affected the rights of British parties to French contracts. An English court, however, gave effect in England to the legislation. Rouquette *v.* Overmann (1875), L. R. 10, Q. B. 525. The difficulties attending such legislation are discussed by Lorenzen, "Moratory Legislation Relating to Bills and Notes, etc.," 28 Yale Law Journ. (1919), 324.

[65] Many of the smaller States of Europe have adopted similar systems in the breaking up of large landed estates. The extraordinary economic conditions in post-war Europe made it possible for lands in many cases to be expropriated without any real compensation. The method of valuation as well as the means of payment have been subjected to much criticism. See in general, Fromme, The Republic of Esthonia and Private Property, Berlin, 1922; *La Constitution de la Lettonie (Thèse)*, Toulouse, 1925, pp. 101–111; Odobestianou, *La Propriété Agraire en Roumanie*, Paris, 1925, p. 67 ff.; Bouroff, *La Réforme Agraire en Bulgarie*, Paris, pp. 110 ff.; Weller, Agrarian Reform in Esthonia, Berlin, 1922; Harrison, Lithuania, Past and Present, London, 1922, pp. 129–132; Martna, *L'Esthonie*, Paris, 1921, pp. 238–240; Yovanovitch, *Constitution du Royaume des Serbs, Croates et Slovènes*, Paris, 1924, pp. 320–334; Sibert, *"La Loi Agraire Lithuanienne,"* 32 *Rev. Gén. de Droit Int. Pub.* (1925), 5; Bellot, "The Protection of Private Property," 1 *Rev. de Droit Int.* (1926), 5.

[66] Proceedings, etc., pp. 31–34.

[67] For a detailed discussion of what constitutes a "denial of justice" see Borchard, *op. cit.*, 330–343.

[68] Alien Land Law, *Diario Oficial*, Jan. 21, 1926. Regulations of Alien Land Law, *Diario Oficial*, March 29, 1926.

dated March 27, 1926. It was said that Article 1 of the law of January 21, 1926, did not apply to mining, transportation, industrial companies and others not having a direct ownership in the lands and waters. Article 2, requiring the statement of renunciation of diplomatic protection, is said not to apply to persons already holding rights in a corporation owning rural lands. Article 3 is likewise not to apply to prior holders of such an interest. Article 7 is said to mean merely that the alien will be required to make a statement of the rights he claims and nothing more. Upon these points, there is, therefore, no dispute, but the requirement that a corporation representing more than 49% of the stock of a Mexican company owning rural lands for agricultural purposes must dispose of that excess interest within ten years is regarded by the United States as confiscatory.[69] Mexico maintains that the law operating only as to the future, it is not to be regarded as retroactive, and since ten years in which to dispose of the interest are allowed, no prejudice will result. To this it is replied that the confiscation is evident, since "a plainly vested interest through ownership of stock is divested by compelling the holder, without his desire or consent, to dispose of the same within a limited time under conditions which may or may not be favorable to the transfer."[70]

As to the former contention, it is not uncommon for States to require by statute that stock in corporations purchased in a legal manner be sold for reasons of public policy. This will always result in some loss to the stockholder, but in no case has such an individual been known to recover from the State the damages suffered. It is possible in the case of the holders of stock in Mexican corporations, however, that the law will operate to cause an unusual loss. The market for the stock is restricted to Mexican nationals, and it is by no means certain that there would be any market for such stock in Mexico. If, after a reasonable effort, no sale at more than a nominal price is made, it could fairly be argued that there had been a denial of justice entailing the responsibility of the Mexican Government. In the absence of such extraordinary loss, no legal ground for international complaint is apparent. The law itself cannot fairly be said to violate any positive rule of international law, so that any recovery had against the Mexican Government should be predicated on the peculiar facts of individual cases.

The second source of disagreement lies in that portion of Article 4 allowing the individual owner of an interest greater than 49% of a Mexican company owning rural lands for agricultural purposes to retain that interest only during his life. Article 6 provides that the heirs of such a person, in case they are not qualified under the law to hold the interest as Mexican citizens, must dispose of such interest within five years from the death of the former owner. The same rule is applicable to persons not qualified to hold land

[69] Aide Memoire handed by the American Ambassador to the Mexican Minister for Foreign Affairs by instructions from the Secretary of State, Nov. 27, 1925.

[70] American Property Rights, etc., pp. 4, 24.

under the law who have land adjudicated to them. In this case the five-year period dates from the adjudication. According to the view of the United States, "permitting present individual holders to retain until their death such rights only mitigates and postpones, but does not eliminate the confiscatory feature."[71] The Mexican Government replied that the law merely places a limitation on the right of inheritance, there being no acquired rights in such cases but a mere expectation of acquiring them.[72] This contention seems sound and to coincide with the doctrine of American courts, which was early stated by Chief Justice Taney to be that a restriction on inheritance is

> . . . nothing more than an exercise of the power which every state and sovereignty possesses, of regulating the manner and term upon which real property or personal within its dominion may be transmitted by last will and testament, or by inheritence; and of prescribing who shall and who shall not be capable of taking it. Every state or nation may unquestionably refuse to allow an alien to take either real or personal property; situated within its limits, either as heir or legatee, and may, if it thinks proper, direct that property so descending or bequeathed shall descend to the state. . . .[73]

Since it is the settled doctrine of American constitutional law that the State may limit or destroy the right of inheritance,[74] it is doubtful if the contentions of the United States on this point will be pressed. There exists no treaty of commerce and amity between the United States and Mexico[75] in which the rights of aliens to inherit are defined, and though the tendency in recent years has been to ameliorate the conditions of the alien with respect to the inheritance of property, it cannot be said unreservedly that there exists at this time a rule of customary international law protecting that interest. Allowing the alien a reasonable time in which to dispose of an inheritance is the usual practice in States refusing to such an alien the right to retain the property, and an argument might well be made that such practice

[71] Note 69, *supra*. *Cf.* Art. 170, Rev. Civ. Stat. of Texas, 1925, the provisions of which are almost identical with Art. 6 of the Mexican Alien Land Law.

[72] American Property Rights, etc., 23.

[73] Mager *v.* Grima, 8 How. 490, 493.

[74] Pullen *v.* Comm. of Wake City (1872), 66 N. C. 361, 363; United States *v.* Fox (1876), 94 U. S. 315.

[75] However, Mexico has numerous treaties which would be breached by a full application of the law. De Cosio, "*El Articulo 27 de la Constitucion General de la Republica en Relacion con los Tratados Celebrados entre Mexico y las Naciones Extranjeros*," in *Documentos Relacionados con la Legislacion Petrolera Mexicana*, Mexico, 1922, ii, 116. The theory of the *rebus sic stantibus* clause has been invoked to excuse those breaches. MacGregor, "*¿La Fraccion I del Articulo 27 de la Constitucion Viola los Tratados Celebrados por Mexico con Algunas Naciones Extrajeros?*" *Ibid.*, 120. It suffices to say that the place of the *rebus sic stantibus* theory in international law is decidedly questionable. Generally on the question see Schmidt, *Über die Völkerrechtliche Clausula Rebus Sic Stantibus*, 1911, esp. pp. 26–92.

is required by international law.[76] Since the Mexican law provides a period for disposing of the properties thus inherited, with possibility of extension in case of necessity, the point is not material.

RENUNCIATION OF PROTECTION

Under paragraph I of Article XXVII of the Constitution, concessions may be granted to foreigners only after they have agreed before the Department of Foreign Affairs to consider themselves as Mexicans with regard to the interest held by them under the Petroleum and Land Laws. Assurances have been made that in the case of persons coming under the Alien Land Law, such declarations would be required only as to future acquisitions.[77] With respect to the Petroleum Law, whether or not the renunciation of protection would be necessary is not certain, though it is probable that it would be construed as is the Alien Land Law.[78] This type of requirement exists in a number of Latin-American constitutions and is often inserted in contracts entered into by those nations with foreigners.[79] The validity of such a clause has been uniformly contested by the United States,[80] and in the present case especial emphasis has been placed on it by the notes emanating from the State Department, for a failure to comply with the law entails a forfeiture of the property. The position of the United States is, in effect, that the State has an international "right" to intervene on behalf of its citizens when the latter are injured abroad in violation of international law. The "right" belonging to the State, it may not be abrogated by the will of another sovereign or the contract of any individual. The Mexican Government considers that the laws do not interfere with that international right, it being said that the agreement is only that the individual will not invoke that aid from his government. Foregoing the exercise of the right to request the aid of his government on the part of the individual is understood not to interfere with the right of that government to intervene on its own initiative. It is admitted that the United States has full power to intervene on behalf of its nationals in case of denial of justice, but that this exercise of power is independent of the legal sanctions which might attend the infringement of the legal undertakings by the individual alien.[81]

This reasoning does not make clear exactly what is meant by the law, and in such case it must be discussed upon general principles and in the light of similar statutes and contracts in other countries. The validity of such an agreement has long been in dispute, it having occasioned differences not only

[76] Borchard, *op. cit.*, Sec. 21, mentions that the minimum standard probably prevents a State from denying completely the alien's right of succession to property, or of obtaining the proceeds from its sale.

[77] Sr. Saenz to Mr. Kellogg, March 27, 1926.

[78] *Cf.* Art. 4 of the Organic Law and Art. 156 of its Regulations.

[79] Borchard, *op. cit.*, 795.

[80] Moore, Digest, VI, 293–328. See also note of Mr. Kellogg to Sr. Saenz, Jan. 28, 1926.

[81] American Property Rights, etc., 9–10, 14–15.

in diplomatic practice but also in the opinions of arbitral tribunals.[82] The larger nations have uniformly denied the validity, while the Latin-American nations have just as uniformly upheld it. Borchard cites nineteen cases in which the question was considered, eight of which have held that the claimant must fulfill the conditions of his contract, while eleven have held that failure to comply with the contractual conditions was no bar to the claim.[83] The wording of the contracts has varied, but since all are directed toward the same object, they should be governed by the same considerations.

The most recent case involving the stipulation is that of North American Dredging Company *v.* Mexico,[84] decided by the United States-Mexican Claims Commission on March 31, 1926. The effect of the decision is to admit the validity of such a contract in so far as it requires the individual to exhaust local remedies before making an international claim, but to deny validity to any part of the contract which would impair the right of the government to intervene in behalf of its citizens. The majority of judicial decisions have, therefore, denied the right of one sovereign or individual to interfere with the international right of another sovereign. Such an attempt has been said to be analagous to the attempt in municipal law to oust the courts of jurisdiction by contract.[85] It is patent that to recognize the right of the State to require the alien not to invoke the aid of his government is effectively to extinguish the right of that government to intervene in his behalf.[86] This would amount to a change in the rules of international law by municipal action, since the right of the State to intervene in proper cases is everywhere recognized. It would thus be in violation of the established rule of international law that municipal laws, decrees, etc., may not violate positive international law. The weight of judicial opinion seems, therefore, to be well supported by reason, and it would not be unreasonable to predict that it will be followed in future judgments. The issue really involved is the present system of international law which sanctions this primitive institution of the protection of citizens abroad. So long as that system is accepted, the right of the State to intervene on behalf of its nationals is not to be denied, though it is admittedly the cause of much friction and disturbance of the pacific relations of states. A recent suggestion [87] that an international court be employed for the handling of the claims of injured aliens seems practical, and offers sufficient appeal to the selfish interests of states

[82] The cases decided by international tribunals are collected and discussed in Ralston, Law and Procedure of Arbitral Tribunals, Stanford, 1926, 58–72. For a general discussion of the problem *see* Borchard, *op. cit.*, 782–810. Charles Cheney Hyde contributes an editorial on the subject in this JOURNAL, Vol. XXI, p. 298.

[83] Borchard, *op. cit.*, 800.

[84] This JOURNAL, Vol. XX, p. 800. Commented on by Borchard in XX, *ibid.*, 536, 538.

[85] Borchard, *op. cit.*, 809.

[86] See Moore, Digest, VI, 307. American Property Rights, etc., 10.

[87] Borchard, "How Far Must We Protect Our Citizens Abroad?" New Republic, April 13, 1927, 214.

to make it possible of adoption. Claims of the individual being made directly against the offending State through judicial process, the disturbing factor of political pressure by the complaining state would be eliminated. The instant case is illustrative of the extreme value of such a system, for had it been already functioning, there would not now be any "extremely critical situation affecting the relations between" the United States and Mexico.

ARBITRATION

There has been a considerable movement toward arbitration of the differences between the two nations, and semi-official statements from the State Departments of both parties involved have signified a willingness to accept that method of settlement.[88] Nevertheless, the President of the United States later announced his opposition to arbitration, there being, in his view "nothing to arbitrate."[89] The Senate has also expressed itself on the subject by a unanimous vote favoring arbitration.[90]

The purpose of the foregoing discussion of the issues in question has been primarily not to attempt to reach categorical conclusions of law and fact, but to demonstrate the justiciable and debatable character of most of the issues involved, and the fact that both in reason and in a study of the precedents is there found the possibility of large differences of legal opinion. The basic issue is whether or not certain rights existed, and if so, what interference with them by the State is permissible—essentially legal issues. Identical problems are continually submitted to the courts of the United States, which courts both find the facts and apply the law to them. States have been reluctant to arbitrate issues involving "vital issues" or the "honor" and "safety" of the State, and it has been one of the functions of international law to promote the peaceful settlement of disputes by a gradual diminution of the number of issues considered by governments not to be arbitrable. During more recent times, many disputes, involving large commercial interests, have been adequately and definitely settled by international judicial bodies, bearing adequate testimony to the effective progress of international law. The notion of "sovereignty" which is so often advanced as a bar to the determination of disputes by international judicial bodies is obsolete. No nation was ever completely "sovereign" externally, the very word now being principally useful in expressing degrees of lack of it.[91] The fact that an international court would consider municipal legisla-

[88] Secretary Kellogg, N. Y. Times, Jan. 19, 1927, p. 1; Minister Saenz, N. Y. Times, Jan. 21, 1927, p. 1.

[89] N. Y. Times, Jan. 22, 1927, p. 1. *Cf.* his more recent speech in New York on April 25. N. Y. Times, April 26, 1927, p. 10, c. 7.

[90] N. Y. Times, Jan. 26, 1927, p. 1.

[91] See the interesting introductory remarks by Dickinson in an article, "New Avenues to Freedom," 25 Mich. Law Rev. 622.

tion and judge it by the criteria of international law has not previously interfered with arbitration.[92]

A new and somewhat extraordinary objection to arbitration in the present dispute has been recently put forth.[93] In effect, the theory submitted is that in cases involving the payment of money, arbitration would not be acceptable "unless there was reason to believe that the state found guilty of wrongdoing could pay the bill." Such plausibility as this view may have on the surface is destroyed when it is realized that such a theory would mean that free access to international courts would be denied to weak countries. Applied to the present case, Mexico's right to a day in court would depend upon her financial stability at the present time. It could scarcely be seriously contended that any such doctrine has a place in international law.

No reason is perceived why claims arising out of the new laws might not be submitted to the Mexican-United States Commissions sitting at the present time. If, however, any objection appears, there is the Hague Court, whose panel offers the foremost jurists of the world, from which the parties may select such judges as they deem acceptable. The arbitral convention should be couched in the broadest terms necessary for a full consideration of all parts of the case. Nations sincerely wishing to meet the obligations placed on them by international law have nothing to fear from the decision of such a court.

If it be denied that this case, involving as it does questions of property law and legal definition, is not susceptible of judicial settlement, then it is difficult to imagine what a justiciable issue is. If the matter is settled by force, physical or other, the modern trend towards enlarging the scope of judiciable issues will be stopped, and arbitration will receive a serious setback. Many years of progress in international relations and law are at stake, and it is to be hoped that a realization of the effect a refusal to arbitrate on behalf of one or both of the parties will have upon the future development of international law will lead to a full judicial determination of the question; assuming, of course, that settlement through diplomatic channels is not possible.

[92] The Venezuelan Arbitrations of 1903 proceeded without regard to the local legislation. Ralston, *op. cit.*, No. 24. Both the Delagoa Bay Railway Case, *supra*, and the Portuguese Religious Property case (The Hague Court Reports, Pamphlet of Carnegie End. for Int. Peace, No. 37), were decided *contra* to municipal legislation. So also the Norwegian Shipping Claims case, *supra*. Numerous other instances are cited in Ralston, *op. cit.*, Nos. 141–161. Also Borchard, *op. cit.*, 181–183.

[93] Hyde, "The Mexican Case—Shall We Arbitrate?", N. Y. Times, Jan. 30, 1927, VIII, 1.

THE PASSING OF EXTRATERRITORIALITY IN SIAM

By Francis Bowes Sayre

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As a result of the expansion of Western trade during the nineteenth century following the industrial revolution, Western nations, ever eager for the coveted trade of the Orient, and stimulated by the need of finding new markets for their accumulating exports, pushed their insistent way into the Far East with new determination. There followed a series of treaties with Eastern potentates opening up new trading areas and clothing Western merchants with extraterritorial rights roughly similar to those enjoyed by foreigners under the Turkish Capitulations. Thus was born in the Orient the régime of extraterritoriality which in three quarters of a century was destined to become the focus of increasing disturbance and unrest in the Far Eastern world.

Siam did not escape the play of these world forces. British merchants pushing beyond India and Burma found in Siam a country unawakened but with rich possibilities; and in the year 1855 Great Britain secured the signature of the Siamese King to a treaty[1] which marked the beginning of the system of extraterritoriality in Siam. Under the existing Siamese law of that day no foreigners had the right to acquire land or to live permanently in Siam; the earlier Anglo-Siamese Treaty of 1826[2] had expressly provided that Siamese authorities might deny to British merchants permission to stay in Siam.[3] The treaty of 1855 ushered in a new régime. It provided that "all British subjects coming to Siam shall receive from the Siamese Government full protection and assistance to enable them to reside in Siam in all security, and trade with every facility, free from oppression or injury on the part of the Siamese."[4] Another article[5] gave to British subjects the right "to trade freely in all the seaports of Siam;" and it further provided that British subjects should have the right to reside permanently in Bangkok or within a certain area defined by the treaty, and under prescribed regulations there to acquire land or construct buildings.

The treaty contained two other outstanding provisions. The treaty of 1826 had provided[6] that all difficulties should be settled "according to the established laws of the place or country."[7] The new treaty of 1855 provided

[1] British and Foreign State Papers, Vol. 46, p. 138.

[2] British and Foreign State Papers, Vol. 23, p. 1153.

[3] Article VII.

[4] Article I of the treaty of April 18, 1855.

[5] Article IV.

[6] Article VI.

[7] Similarly, the treaty of March 20, 1833, with the United States had provided (Article IX) that "merchants of the United States trading in the Kingdom of Siam shall respect and follow the laws and customs of the country in all points."

that "any disputes arising between Siamese and British subjects shall be heard and determined by the [British] Consul in conjunction with the proper Siamese officers; and criminal offenses will be punished, in the case of English offenders, by the Consul, according to English laws, and in the case of Siamese offenders by their own laws, through the Siamese authorities. But the Consul shall not interfere in any matters referring solely to Siamese, neither will the Siamese authorities interfere in questions which only concern the subjects of Her Britannic Majesty." [8]

The second provision, framed to prevent the reduction of British trade through increased Siamese duties, stipulated that "on all articles of import the duties shall be three per cent;" [9] and it was further stipulated that "the tax or duty to be paid on each article of Siamese produce previous to or upon exportation" should be that specified in a long and minute schedule of export and inland duties attached as an annex to the treaty. Both of these provisions were explained and amplified in an explanatory agreement signed the following year.[10]

At the time when these two provisions were adopted, no one dreamed that they could or would be used in future years to curb the domestic and foreign policy and handicap the future development of Siam. The trial of a handful of British traders, accustomed to a different law and a different civilization, by their own consul seemed a matter of mutual convenience; and the financial needs of the undeveloped state were amply covered by the revenue from a three per cent. import tariff. The ominous feature of this one-sided arrangement was that the treaty contained no time limit; by its terms it could not be modified without the consent of both parties, and was therefore irrevocable and unending.

It was only natural that other Western nations should demand like privileges; and during the succeeding years, therefore, Siam became bound by a series of treaties closely similar to the British treaty of 1855, supplemented by the explanatory agreement of 1856. In 1856 treaties were signed with the United States [11] and with France,[12] in 1858 with Denmark,[13] in

[8] Article II. [9] Article VIII.

[10] British and Foreign State Papers, Vol. 46, p. 146. Article II of the supplementary agreement of 1856, explaining the meaning of Article II of the treaty of 1855, stipulated "that all criminal cases in which both parties are British subjects, or in which the defendant is a British subject, shall be tried and determined by the British Consul alone. All criminal cases in which both parties are Siamese or in which the defendant is a Siamese, shall be tried and determined by the Siamese authorities alone.

"That all civil cases in which both parties are British subjects or in which the defendant is a British subject, shall be heard and determined by the British Consul alone. All civil cases in which both parties are Siamese, or in which the defendant is a Siamese, shall be heard and determined by the Siamese authorities alone . . .

"British subjects, their persons, houses, premises, land, ships or property of any kind, shall not be seized, injured, or in any way interfered with by the Siamese."

[11] British and Foreign State Papers, Vol. 46, p. 383.

[12] *Ibid.*, Vol. 47, p. 993. [13] *Ibid.*, Vol. 50, p. 1073.

1859 with Portugal,[14] in 1860 with the Netherlands,[15] in 1862 with Germany,[16] in 1868 with Sweden and Norway,[17] with Belgium,[18] and with Italy,[19] in 1869 with Austria-Hungary,[20] and in 1870 with Spain.[21] Each of these treaties in varying language imposed extraterritoriality upon Siam. Thus, the American treaty of 1856 adopted [22] the language of the British treaty of the previous year; the Portuguese treaty of 1859 provided that:

> Any question which may arise between Portuguese and Siamese subjects must be laid before the Portuguese Consul, who, in concert and agreement with the Siamese authorities, will endeavor to settle it amicably; and in case of not being able to do so, civil questions will be decided by the Consul or by the Siamese authority, according to the nationality of the delinquent or accused person, and in conformity with the respective laws. The Consul will never interfere in questions which solely concern Siamese subjects, nor the Siamese authorities in questions solely relating to Portuguese subjects, except in the case of crimes in which the delinquents will be taken into custody by the local authority and handed over to the Portuguese Consul to be punished according to the Portuguese laws, or sent to Macao to be tried there.[23]

The Italian treaty of 1868 provided that:

> Any dispute or controversy between Italian and Siamese subjects, shall be settled by the Diplomatic Representative or jointly by the Consuls and the functionaries of Siam. Criminal cases shall be adjudged by the Legation or the Consulates, if the delinquent be an Italian, and by the local authorities if he be a Siamese subject. But neither the Legation nor the Consulates shall interfere in matters affecting Siamese subjects only, nor shall the local authorities interfere in questions relating purely to Italian subjects.[24]

All of the treaties, in addition to the extraterritorial provisions, contained substantially the same fiscal provisions as in the British treaty, restricting Siam to a fixed schedule of duties and preventing her from imposing an import tariff in excess of three per cent. All were without time limit, irrevocable.

In 1868, with the accession of King Chulalongkorn to the throne of Siam, a new era began. Under the leadership of that remarkable king, telegraphic and mail communication was opened up with foreign countries, slavery abolished, railroads constructed, irrigation projects carried out, water supply systems built, modern hospitals erected, and the whole kingdom transformed and quickened with new life and development. The government of the kingdom was radically and completely reorganized, modern ministries

[14] British and Foreign State Papers, Vol. 72, p. 109.
[15] *Ibid.*, Vol. 58, p. 262.
[16] *Ibid.*, Vol. 53, p. 741.
[17] *Ibid.*, Vol 69, p. 1135.
[18] *Ibid.*, Vol. 59, p. 405.
[19] *Ibid.*, Vol. 60, pp. 773, 783.
[20] *Ibid.*, Vol. 61, p. 1308.
[21] *Ibid.*, Vol. 61, p. 483.
[22] Article II.
[23] Article VI.
[24] Article IX. See also the explanatory declaration of Dec. 10, 1868. British and Foreign State Papers, Vol. 60, p. 783.

were established, and an efficient system of law courts was set up to administer justice along Western lines. Recognizing the fundamental importance of modern law, the king created a royal commission to study the problem of legal administration for Siam and to draft carefully prepared codes of law based on the best European codes. By the time of his death in 1910, this tireless and able sovereign had completely transformed the old Siam into a progressive, vigorous, modern state.

With the changed conditions, abuses began to make themselves felt. Extraterritoriality fitted well enough an Oriental kingdom innocent of Western law or Western institutions; it did not fit a country with modern courts administering Western law and with a well-developed sense of international responsibility. Yet the European nations insisted on not only maintaining it for their European subjects, but even extending it so as to cover all those born in the Asiatic colonies which they were fast acquiring, since such colonials were in point of law European subjects. As a result, Siam was deprived of jurisdiction over hosts of Cambodians, Annamites and Laos from Indo-China, Javanese, Malayans, Burmese, Chinese born in Macao or Hongkong, and East Indians, even though residing permanently and perhaps doing an extensive business in Siam. Whatever violations of Siamese law they might commit, Siam was powerless to touch them or their property. They could be tried only in foreign consular courts; these courts in practice not infrequently refused to apply the laws of Siam, and were often presided over by men who had no legal training whatsoever. In addition to these thousands of Asiatic subjects, the treaty provisions were made to include foreign protegés as well; and foreign protection thus came to be claimed not only for subjects born in Asiatic colonies but for such Chinese or other Asiatics as any European Power chose to enroll at its consulate. It was only natural that out of such a system abuses should grow; those desirous of avoiding police interference or arrest—smugglers, gamblers, disreputable characters—often resorted to foreign papers as a wise measure of protection. If, in spite of their precautions, they should be unlucky enough to be caught, they felt confident of more lenient treatment before many of the foreign consuls, who were ordinarily not permitted under their laws to impose any kind of drastic punishment and who were popularly expected to favor their own subjects. There were even times when foreign papers came to be surreptitiously bought and sold at so much a head by underlings in the foreign legations.

The treaties exempted foreigners from the jurisdiction of Siamese courts. The Western nations insisted that these provisions should be interpreted as carrying exemption from Siamese legislation as well, except such as the Western nations might choose to accept. As a result, further progress became increasingly difficult. When Siam passed an education law providing for compulsory general education, its enforcement was prevented in certain communities because one of the Western nations refused to accept

it and therefore objected to its enforcement against its Asiatic subjects. When Siam was asked to adhere to the International Convention for the Protection of Industrial Property she was obliged to confess her inability to do so; for when in 1914 she had promulgated a law for the protection of trademarks and trade-names, she soon found that it was foreigners who were chiefly violating the law, and the practice proved so profitable that not every treaty Power could be induced to accept it, so that the protection of trademarks as required by the international convention was a practical impossibility. Siam began to find herself in a position where she was unable to enforce progressive legislation without first winning the consent of the Foreign Offices of most of the nations in Europe.

Further progress was menaced by the fiscal provisions of the treaties no less than by the jurisdictional ones. From a material viewpoint progress costs money. The spread of education, the organization of an efficient judicial system, the undertaking of increased police regulation, the renunciation of opium revenues, the securing of competent foreign advisers and helpers, all swell current expenditures. For various practical reasons increased revenue from taxation seemed impossible or inadvisable. Normally the situation would be met by increased revenue from tariff. But the fiscal provisions of the old treaties holding the Siamese import tariff down to three per cent. made this impossible. After 1920 the time seemed approaching when further progress might be prevented by Siam's inability to meet its financial cost because of the treaty provisions.

Long before the death of King Chulalongkorn in 1910, Siam had sought in every possible way to free herself from the shackles of the treaty restrictions, but in vain. As a small nation she lay at the mercy of the more powerful European states; and these saw no reason for relinquishing the privileges and advantages which they had secured. By the beginning of the twentieth century, apart from special arrangements for some of the northern states, the most that Siam had been able to attain were agreements with certain of the treaty Powers to prevent the wholesale creation of protégés and to fix definite limits to the groups entitled to foreign protection and exemptions. Thus, under the British agreement of November 29, 1899,[25] although Great

[25] British and Foreign State Papers, Vol. 91, p. 101. It was agreed that registration should be confined to the following categories of persons:

"1. All British natural born or naturalized subjects other than those of Asiatic descent.

"2. All children and grandchildren born in Siam of persons entitled to be registered under the first category, who are entitled to the status of British subjects in contemplation of English law. Neither greatgrandchildren nor illegitimate children born in Siam of persons mentioned in the first category are entitled to be registered.

"3. All persons of Asiatic descent, born within the Queen's dominions, or naturalized within the United Kingdom, or born within the territory of any Prince or State in India under the suzerainty of or in alliance with the Queen; except natives of Upper Burma or the British Shan States who became domiciled in Siam before January 1st, 1886.

"4. All children born in Siam of persons entitled to be registered under the third category.

Britain insisted on rights of extraterritoriality for the children of all British subjects, and even for the grandchildren of European British subjects, although born and resident all their lives in Siam, she consented that great-grandchildren of European and grandchildren of Asiatic British subjects should not be entitled to rights of extraterritoriality. Somewhat similar agreements were made with The Netherlands on May 1, 1901, with France[26] in 1904, with Denmark[27] in 1905, and with Italy[28] in the same year. Beneficial as these agreements were, they did not of course check the fraudulent obtaining of foreign papers by misrepresentation or corruption; and although they put a limit upon some of the abuses to which the system of extraterritoriality lent itself, they in no way cured the evils of extraterritoriality itself.

Meanwhile changed conditions in certain of the northern provinces made it necessary as early as 1883 to modify somewhat the strict provisions of the British treaty of 1855. With the opening up of the northern part of Siam, Burmese, Shans and other Asiatics entitled to British protection gradually entered the northern provinces and took up their residence there in increasing numbers. Under the stipulations of the 1855 treaty, this native population was, on the one hand, entitled to all the privileges of extraterritoriality and yet, on the other, strictly speaking, as British subjects they were debarred from residing there at all. To meet the altered conditions for which the provisions of the treaty of 1855 had become unsuitable, a new treaty was made in 1883[29] applicable to the northern provinces alone. The problem of jurisdiction over these Asiatic British subjects was solved in a most interesting way. The treaty provided that all cases, both civil and criminal, arising in the northern provinces of Chiengmai, Lakon and Lampoonchi between British subjects, or in which a British subject might be a party as complainant, accused, plaintiff or defendant, should be tried according to Siamese law by a special Siamese court sitting in Chiengmai, presided over by a Siamese commissioner and judge, under the proviso, however, (1) that the British consul residing at Chiengmai should always have the right to be present at the trial if he so desired and to make such suggestions to the judge as he might

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No grandchildren born in Siam of persons mentioned in the third category are entitled to be registered for protection in Siam.

"5. The wives and widows of any persons who are entitled to be registered under the foregoing categories."

[26] Articles 10 and 11 of Franco-Siamese Treaty of 1904. See British and Foreign State Papers, Vol. 97, p. 961.

[27] Article I of Danish treaty of March 24, 1905. British and Foreign State Papers, Vol. 101, p. 289.

[28] Article I of Italian treaty of April 8, 1905. British and Foreign State Papers, Vol. 101, p. 409.

[29] British and Foreign State Papers, Vol. 74, p. 78. Many of the provisions of this treaty were taken from the treaty of January 14, 1874, between Siam and the Government of India. See British and Foreign State Papers, Vol. 66, p. 537.

think fit in the interests of justice, (2) that the British consul should have the power at any time before judgment to evoke out of the Siamese court any case in which a British subject might be defendant or accused, in which event the case would forthwith be transferred for adjudication to the British consular court at Chiengmai, and (3) that in both civil and criminal cases in which a British subject might be a party, either party might appeal to Bangkok, in which case, if the accused or defendant were a British subject, the final decision on appeal should rest with the British Consul General. In other words, in certain of the northern provinces henceforth Great Britain would allow Siam to apply its own law and to exercise jurisdiction over British subjects on sufferance; but this power would always be subject to Great Britain's right to evoke from the Siamese court any case where the defendant or accused was a British subject, and try it herself, or to appeal from the Siamese judgment and render the appeal judgment herself. It was an interesting solution for a difficult problem; its justification would depend entirely upon the ability of the Siamese courts to administer efficient justice.

Subsequent events more than justified the experiment. The competency of the Siamese courts was evidenced by the remarkably small number of cases evoked under the provisions of the treaty. From the British viewpoint, so satisfactory did the arrangement prove that not only was it continued in force without change and even extended to a number of other northern provinces,[30] but twenty six years later, when the British treaty of 1909 came to be written, the arrangement of the treaty of 1883 was extended to all British pre-registered subjects throughout Siam.[31]

The satisfactory nature of this arrangement caused France to adopt very similar provisions in the Franco-Siamese Treaty of 1904.[32] Article XII of that treaty, after providing that all French citizens, subjects and protégés in Siam should continue to be exempt from the jurisdiction of Siamese courts, went on to provide that, as an exception in the northern provinces of Chiengmai, Lakon, Lampoonchi and Nan, all civil and criminal cases concerning French *resortissants* (including French *citoyens*) should be brought before the "Siamese International Court," with the proviso that the French consul should have the right to assist in the hearings and to evoke and try himself all cases in which the defendant was French or a French protégé. This so-called "Siamese International Court" was not in fact international at all. It was only a new name for the Siamese tribunal created under the British treaty of 1883, a court created by and entirely within the control of the Siamese Government, presided over by a judge chosen and paid solely by

[30] Extended to Muang Nan and Phre by exchanges of notes dated December 31, 1884, and January 10, 1885, and to Muang Than, Raheng, Sawankalok, Sukothai, Utaradit and Pichai by notes dated September 29, October 28, 1896. British and Foreign State Papers, Vol. 88, pp. 33–35.

[31] Article V of British treaty of 1909. British and Foreign State Papers, Vol. 102, p. 127.

[32] British and Foreign State Papers, Vol. 97, p. 961.

the Siamese Government. It was international only in the sense that its jurisdiction was confined to cases in which foreigners were parties and by virtue of treaty provisions foreign consuls had the right to be present at its sessions and to evoke certain of its cases. As a matter of fact, however, under the French treaty of 1904, as under the British treaty of 1883, in practice the right of evocation was exercised only in rare instances. Very similar provisions, also applicable to the northern provinces alone, were adopted shortly afterwards in the Danish treaty of 1905,[33] and in the Italian treaty of the same year.[34]

Except for these special arrangements covering certain of the northern provinces, however, nationals of the treaty Powers still continued altogether exempt from Siamese jurisdiction. In 1898 Siam had entered into a treaty with Japan[35] which granted rights of extraterritoriality to Japanese subjects in Siam, but recognized that the system of extraterritoriality should be a temporary expedient and made it terminable with the completion of "the judicial reforms of Siam," *i.e.*, the coming into force of the Siamese codes of law. In 1899 Siam had signed a declaration with Russia,[36] granting each to the other most-favored-nation treatment with respect to jurisdiction, commerce and navigation, terminable, however, by either party at any time upon six months notice. Apart from the special northern arrangements, therefore, Siamese courts were powerless to enforce obedience to Siamese law upon the thousands of British, French, American, Danish, Portuguese, Dutch, German, Swedish, Norwegian, Belgian, Italian, Austrian, Spanish, Japanese and Russian subjects and protégés resident in Siam; and, except in the case of the handful of Japanese and Russians there resident, there seemed no possible way to remedy a situation which was growing every year more difficult.

A new phase in Siam's battle to regain jurisdictional autonomy was marked by the treaty of 1907 with France and that of 1909 with Great Britain. Thousands of French Asiatic subjects and protégés live in Siam; and inasmuch as large parts of French Indo-China were carved at various times out of Siam, and the inhabitants of these territories are therefore in fact closely assimilated to the Siamese, there seemed inherently no reason why they should be treated in Siam differently from the Siamese. Yet under the French treaty of 1856, as interpreted in practice and as reaffirmed in the treaty of 1904, apart from the northern provinces, all these Asiatics as French subjects and protégés were entitled to exemption from Siamese jurisdiction.

The right of land ownership in Siam also came into question. Under the early treaties foreign traders were given the right to acquire and own land

[33] Article VI (b). British and Foreign State Papers, Vol. 101, p. 289.
[34] Article III, subsect. 3. British and Foreign State Papers, Vol. 101, p. 409.
[35] British and Foreign State Papers, Vol. 90, pp. 66, 70.
[36] *Ibid.*, Vol. 92, p. 109.

and establish a permanent residence in Siam only in or near Bangkok; beyond a distance of 24 hours' journey from Bangkok foreign subjects were allowed neither to go without a passport nor to acquire land.[37] The provisions of these early treaties still remained in force; consequently, when portions of Siam were annexed to French Indo-China, the inhabitants, as well as other Laos, Cambodians and Annamites, resident in Indo-China, by virtue of their becoming French subjects or protégés lost the right to acquire land in the interior of Siam.

Because of the manifest absurdity of continuing to apply the provisions of the old treaties, framed for European traders, to Asiatic subjects and protegés, a special arrangement was worked out in a new French treaty signed on March 23, 1907,[38] dealing with the status of French Asiatic subjects in Siam. Under this treaty French Asiatic subjects and protégés were in general assimilated to Siamese. They were henceforth not to enjoy rights of extraterritoriality, but to be subject to Siamese courts and liable for the ordinary Siamese taxes. On the other hand, the treaty expressly provided [39] that they should be entitled henceforth in every part of Siam to all the rights and privileges enjoyed by Siamese subjects, particularly the right to acquire land and the right to go or settle anywhere in the kingdom. With regard to the jurisdiction of Siamese courts, a distinction was drawn between those Asiatics registered prior to the date of the treaty, henceforth known as "preregistered subjects," and those registered *after* 1907, known thenceforth as "postregistered subjects." The jurisdiction of the so-called "international courts" of the 1904 convention was extended so as to cover all preregistered French Asiatic subjects and protégés throughout the whole of Siam, with the right of a French consul to be present at the trial and the right to evoke the case and try it himself should he see fit to do so; whereas all French Asiatic subjects and protégés registered *after* 1907 would henceforth be subject to the jurisdiction of the ordinary Siamese courts, without any rights of evocation. The régime of "international courts" was to end upon the promulgation and putting into force of all the Siamese codes of law.[40] As to French European citizens and subjects, however, the treaty of 1907 made no change. All French non-Asiatic citizens, subjects and protégés were to continue to enjoy rights of extraterritoriality as under the treaty of 1856; and the fiscal provisions of that treaty, including the three per cent. tariff restriction, were continued in full force and without limit of time.[41]

The Jurisdiction Protocol attached to the treaty contained two further provisions concerning the functioning of the international courts. One of

[37] See, for instance, British treaty of 1855, Art. IV.

[38] British and Foreign State Papers, Vol. 100, p. 1028.

[39] Article VI.

[40] *I.e.*, the Penal Code, the Civil and Commercial Codes, the Codes of Procedure, and the Law for Organization of Courts.

[41] Art. VII.

them provided that judgments of appeal from international courts of first instance must bear the signature of two European judges,[42] thus introducing into the treaty the requirement of European advisers sitting as judges in Siamese courts. The other provision concerned the right of evocation allowable to preregistered Asiatic subjects. It provided that the right should terminate as to all matters coming within the scope of Siamese codes or laws duly promulgated and put into force.[43] Under the French treaty of 1907, therefore, Siam regained judicial autonomy over French Asiatic subjects and protégés, but only for a heavy price. Siam had to grant to them every right and privilege enjoyed by Siamese subjects as such; she had to submit to the requirement of European legal advisers sitting in a Court of Appeals, at least for a limited period; and in addition the treaty was sealed by Siam's cession to France of further Siamese territory, *i.e.*, the territory of Battambang, Siem Reap and Sisophon. In spite of this heavy price, all French European subjects and protégés continued exempt from Siamese jurisdiction; and every one of the burdensome fiscal restrictions of the treaty of 1856 was continued in full force.

The French treaty of 1907 was followed by the British treaty of March 10, 1909.[44] Twenty-six years of actual experience with the Siamese administration of justice in the international court in the north under the treaty of 1883 had convinced the British that, under proper safeguards and guarantees, British interests could safely be entrusted to Siamese courts. The British treaty of 1909 therefore was built upon the principle of renouncing for a price the general rights of extraterritoriality for British subjects, but retaining such safeguards and guarantees as adequately to protect British interests. The treaty accordingly provided [45] that the system of international courts, together with the right of evocation, inaugurated for the north in the treaty of 1883, should be extended so as to cover all British subjects in Siam registered at the British consulate before March 10, 1909, the date of the treaty. All British subjects registered after 1909 were henceforth to be subject to the jurisdiction of the ordinary Siamese courts. As in the case of the French treaty of 1907, the right of evocation from international courts was to cease in all matters coming within the scope of codes or laws regularly promulgated and communicated to the British Legation at Bangkok, and the system of international courts was to come to an end upon the promulgation and coming into force of all the Siamese codes of law. Judgments on appeal from either the international courts or the ordinary Siamese courts must bear the signature of two European judges.

The most noteworthy feature introduced into the British treaty of 1909, however, related to the use of foreign judicial advisers. Section 4 of the Jurisdiction Protocol annexed to the 1909 treaty provided that "in all cases

[42] Clause V. [43] Clause IV.
[44] British and Foreign State Papers, Vol. 102, p. 126.
[45] Article V; Annex II, sec. 3.

whether in the international courts or in the ordinary Siamese Courts in which a British subject is defendant or accused, a European legal adviser shall sit in the Court of First Instance. In cases in which a British born or naturalized subject not of Asiatic descent may be a party, a European adviser shall sit as a judge in the Court of First Instance, and where such British subject is defendant or accused the opinion of the adviser shall prevail." In other words under the 1909 treaty no binding judgment could thenceforth be rendered against a European British subject except by a European judge or adviser. As a matter of fact the European adviser was in every sense a Siamese official; the Siamese Government freely chose him, paid him and controlled him. In practice the European advisers have been chiefly British and French, and they have generally acted quite independently of the desires and wishes of the British and French Legations. Nevertheless, the very fact that the treaty in absolute terms required their presence in Siamese courts caused a natural irritation; and to many it seemed that since Siamese judges could not of themselves render a binding judgment against European British subjects, Siam by the treaty of 1909 had gained the shadow rather than the substance of actual judicial autonomy. Moreover, no time-limit had been set to the provisions requiring the presence of European judicial advisers; the requirement was as irrevocable and unending as the provisions of the treaty of 1855. Furthermore, all the burdensome fiscal provisions of the old 1855 Treaty, including the three per cent. tariff, were continued in full force.[46]

As was the case with the French treaty of 1907, Siam had to pay a heavy price for the treaty of 1909. Although in a sense Siam gained the abolition of British rights of extraterritoriality, she had to agree (1) that henceforth without end European legal advisers should sit in Siamese courts where British subjects were defendants or British non-Asiatic subjects were parties; and (2) that British subjects should henceforth "enjoy throughout the whole extent of Siam the rights and privileges enjoyed by the natives of the country, notably, the right of property, the right of residence and travel."[47] In addition a territorial compensation was exacted. Siam under the treaty ceded to Great Britain the States of Kelantan, Tringgam, Kedah, Perles and adjacent islands. Siam thus gave all that she had to give in return for a treaty which saddled her courts forever with foreign advisers and which still maintained unaltered the three per cent. tariff restriction. Without having gained autonomy, Siam had nothing left with which to bargain.

During the ten years that followed, with the exception of a treaty with Denmark[48] signed in 1913, following in general the terms of the British treaty of 1909, Siam was unable to make further progress on the road to judicial or fiscal autonomy. During all these years, however, Siam kept steadily improving her administration of justice and in countless ways manifesting an

[46] Article VII. [47] Article VI.

[48] British and Foreign State Papers, Vol. 107, p. 750.

extraordinary progress. A Royal Code Commission, with the help of French advisers, was slowly and patiently preparing Siamese codes of law modeled on the best of the European codes. The Penal Code was completed and promulgated in 1908; following this, laws were prepared and codified on Civil Obligations, Things (Property), Partnership, Bankruptcy, Conflict of Laws, Family Registration, etc., etc. This work has been done in a most painstaking and scholarly manner; the Code Commission is still at work, and the final promulgation of all the codes will probably not take place for at least five years more. When it came to inducing the great Powers of Europe to surrender their treaty privileges, however, Siam's progress seemed to count for little. All her efforts to shake off the old treaty restrictions proved unavailing; and the goal of actual fiscal and jurisdictional autonomy seemed as far away as ever.

During the World War, Siam joined the Allied Powers fighting against Germany for the rights of small nations, and after interning the Germans resident in Siam she sent an expeditionary force to France composed largely of aëroplanists. At the end of the war Siam at Versailles appealed to her Allies on the strength of their oft-repeated assertions that the war was really fought to protect the rights of small nations and to remove international injustices that make for war. Although Siam's plea seemed lost on many there present, the justice of the appeal impressed itself strongly on the mind of President Wilson. He promised that America would be prepared to give Siam a new treaty and would as a matter of justice renounce without compensation her rights of extraterritoriality.

The result of President Wilson's action was the Siamese-American Treaty of 1920,[49] a treaty of epoch-making importance for Siam. It began by abolishing the right of extraterritoriality set up under the old treaty of 1856. All Americans were to be henceforth subject to the jurisdiction of the ordinary Siamese courts. To insure against possible injustice, however, the treaty provided that until five years after the promulgation of all the Siamese codes of law, America was to have the right to evoke any case in which an American was defendant, or accused, from any Siamese court, except the Supreme Court, and proceed to try the case in its own consular court. If the case were so evoked and tried in an American consular court, however, Siamese law was to prevail as to all matters coming within the scope of Siamese laws regularly promulgated. The treaty contained no mention of foreign legal advisers. In the British treaty of 1909 Great Britain had placed its reliance upon two different rights, each somewhat contradictory in its nature to the other, the right of evocation and the right of imposing European legal advisers upon Siamese courts. America refrained from demanding the latter right, which could not but prove a constant cause of irritation, and placed its reliance instead upon the right of evocation, en-

[49] U. S. Treaty Series, No. 655; British and Foreign State Papers, Vol. 113, p. 1168; Am. Jour. Int. Law, Vol. 16, Supp. p. 25.

larged in its scope but strictly limited in its duration so as to cease altogether five years after the promulgation of the Siamese codes of law. Because of Siam's confidence in the competency of her own courts and because of the time-limit set upon the right, Siam could willingly give to America such an enlarged right of evocation; as a matter of fact no case has ever been evoked under the American treaty.

So far as fiscal provisions were concerned, America recognized Siam's right to complete fiscal autonomy, and she agreed that the old fiscal restrictions should be removed and Siam should have the right to raise its tariff beyond the three per cent. limit against American goods as soon as all other treaty Powers having similar rights against Siam should come to a like agreement without price or compensatory benefit.

Of almost equal importance were the abrogation and termination provisions. The treaty of 1856 was abrogated in its entirety; and the new treaty was made terminable after ten years by either party upon giving one year's notice. A further all-important clause expressly provided that its termination should not have the effect of reviving any of the former treaties abrogated by the new one. So far as America was concerned, therefore, Siam was at last freed from the old extraterritorial restrictions. For this treaty America demanded and received no compensation whatsoever.

Once the American treaty was signed, Siam turned again to the European nations and asked them to follow America's lead, but for one reason or another results were not forthcoming. Great Britain replied that she had gone further in the treaty of 1909 than any other European nation; and that until other nations with substantial commercial interests had gone as far as she had any discussion of further treaty revision would appear to be premature. France made favorable replies; but as the months passed into years and nothing definite materialized hopes began to fade. Siam could not afford to cede any additional territory; and until she could succeed in separately persuading Great Britain, France, Italy, Holland, Belgium, Denmark, Norway, Sweden, Spain and Portugal each to surrender its fiscal rights voluntarily, and without compensatory benefit, Siam must remain helplessly and permanently bound by the old three per cent. tariff restriction in addition to the existing rights of extraterritoriality. The problem of how to induce ten European nations, some of whom had very substantial commercial interests in Siam, to give away their rights for nothing seemed insoluble; in spite of the American treaty, Siam seemed from a practical viewpoint no nearer her goal than before.

In 1923 a new treaty was negotiated with Japan closely following the American treaty of 1920. Under the Japanese treaty of 1898 Japan enjoyed the three per cent. Siamese tariff restriction only by virtue of a most-favored-nation clause,[50] whereas she enjoyed rights of extraterritoriality for a limited period by virtue of express grant.[51] The new treaty, signed on March 10,

[50] Article VI. [51] Procol, Article I.

1924,[52] abrogated the existing rights of extraterritoriality, subject, however, to the same rights of evocation as under the American treaty, and similarly provided that all rights of evocation would cease five years after the promulgation of the Siamese codes of law. Reciprocal most-favored-nation treatment with respect to import duties was continued as under the former treaty; and the new treaty was made terminable after ten years by either party. In substance Siam gained very little by this new treaty; for although under its terms Japanese subjects came immediately under the jurisdiction of Siamese courts, the right of evocation was made to extend until five years after the promulgation of the Siamese codes, whereas under the treaty of 1898 extraterritoriality with all its attendant rights was to cease absolutely with the promulgation of the codes. The chief value of the new Japanese treaty lay in its psychological effect upon the European nations. Siam could henceforth point to two of the great Powers as leading the way, and ask the remaining great Powers to follow in their lead.

Experience had shown, however, that Siam could not hope to induce the various European Powers voluntarily to surrender their existing rights through long-distance negotiations carried on in Bangkok. The force of local prejudice and the unavoidable lack of understanding on the part of European Foreign Offices of the true conditions in Siam made it evident that the ordinary and routine methods of negotiation could end only in failure. If success were possible it could come only through convincing the responsible officials in the Foreign Offices of each of the treaty Powers that wise statesmanship demanded the recognition of Siam's remarkable progress and stability and the consequent freeing of her from the shackles of extraterritoriality so that her further development might be unimpeded. Such results could come only through direct, personal work in Europe. Accordingly, His Majesty King Rama VI decided to send the Adviser in Foreign Affairs as Siam's representative on a roving commission to Europe to visit, one after another, the European Foreign Offices, seeking to persuade them to renounce their existing rights and, if he succeeded in this, to negotiate in conjunction with the Siamese Ministers in Europe new treaties.

In the meantime conversations with the French Foreign Office which had dragged along for over three years came to a head. From the outset exceptional difficulties had been encountered owing to the fact that a new French treaty necessarily involved many questions between Siam and her Eastern neighbor, French Indo-China, and because of the political situation in Paris, France was anxious to avoid giving offense to Indo-Chinese opinion by the relinquishment of Indo-Chinese rights against Siam. It was finally agreed that, except as to jurisdictional and fiscal rights, all questions peculiarly affecting Indo-China should be settled by a separate Indo-Chinese convention between Siam and France, negotiated after the main French treaty directly between Bangkok and Hanoi. The negotiations for the French

[52] League of Nations, Treaty Series, Vol. 31, p. 187, Reg. No. 795.

treaty were then placed in the hands of the French Minister to Bangkok, who came from Paris to Bangkok late in 1923; and during 1924 a definite treaty text was worked out covering all jurisdictional and fiscal questions and matters of general French concern. As the treaty took definite form, however, innumerable complications arose, and protracted delays followed.

In the fall of 1924 Siam's Adviser in Foreign Affairs left Bangkok on his European mission. Upon his arrival in Paris, French negotiations were taken up afresh, new obstacles which had arisen were overcome, and in spite of difficulties which at one time threatened disaster, the treaty was finally signed on February 14, 1925. This treaty was in general based upon the lines of the American treaty of 1920, but modifications were introduced so as to leave undisturbed the existing position of Indo-Chinese in Siam. Under its terms the position of French Asiatic subjects and protégés remain as fixed by the treaty of 1907, *i.e.*, all those registered at French consulates prior to 1907, are to be tried in the so-called international courts, and all those registered subsequent to 1907 in the ordinary Siamese courts with no right of evocation. The system of international courts, with the attendant right of evocation, is to terminate, however, with the promulgation of all the Siamese codes of law. French citizens, who would naturally complain of treatment inferior to French Asiatic subjects and protégés, are also to be tried in the international courts, but with the right of evocation, as in the American treaty, until five years after the promulgation of all the Siamese codes. Subject to these restrictions, all French extraterritorial rights in Siam are abolished by the new treaty; and as the "International Court" is in reality a Siamese court with restrictions, and as all these restrictions have definite and fixed time limits, the treaty means in substance the grant of actual judicial autonomy to Siam.

The fiscal provisions of the earlier treaties are also abrogated. In Article XV, closely following the corresponding article in the American treaty, France recognizes Siam's right to complete fiscal autonomy, and agrees that Siam may raise its tariff on French goods beyond three per cent. as soon as all other treaty Powers having similar rights against Siam come to a like agreement voluntarily and without compensatory benefit. Until the conclusion of a new Franco-Siamese customs convention, each is to enjoy *le traitement le plus favorable* with respect to its goods imported into the other country. Questions directly involving the relationship between Siam and its neighbor, French Indo-China, are reserved for a separate Indo-Chinese convention. With the exception of provisions particularly relating to Indo-China, the treaty of 1856 and all subsequent treaties and conventions are abrogated. As in the American treaty, either party may after ten years denounce the new treaty on giving one year's notice, but it is expressly provided that such a denunciation will not have the effect of reviving any of the former treaties or conventions abrogated by the 1925 treaty. The new treaty, in a word, has freed Siam from the burden of French extraterritorial rights, and so far as

France is concerned, has restored to Siam her full fiscal autonomy, subject to a like grant by all other treaty Powers.

Interesting arbitration provisions were also inserted. A small nation is always at a disadvantage if international disputes are to be settled by war, especially if its territory adjoins a powerful neighbor. A sweeping arbitration clause was therefore inserted providing for the compulsory arbitration of all questions whatsoever, not excluding questions of vital interest or national honor. Both parties agree "in conformity to the principles announced in the Covenant of the League of Nations that in case controversial questions should arise between them in the future which cannot be settled by mutual agreement or by the method of diplomacy, they will submit the controversy to one or more arbitrators chosen by them, or in default of arbitration to the Permanent Court of International Justice. This Court will obtain jurisdiction by means of a common agreement between the two parties, or if agreement cannot be reached, by the simple request of either of them." [83]

Immediately after the signature of the French treaty, negotiations were begun at The Hague for the conclusion of a new treaty with The Netherlands. This was a matter of particularly large importance to Siam because of the great number of Javanese settled in Siam, all claiming extraterritorial rights by virtue of their Dutch allegiance. The negotiations thus inaugurated were successfully completed on June 8, 1925, when a new treaty was signed at The Hague following almost word for word the American treaty of 1920. It abolished Dutch rights of extraterritoriality, acknowledged Siam's full right to fiscal autonomy, abrogated all prior treaties between the two countries, and was made terminable after ten years by either party upon giving one year's notice.

In the meantime Siam's representative had opened up negotiations in London for a new British treaty. In many respects this was the most important of all; for British trade is predominant in Siam and British interests there are far more substantial than those of any other country. Over eighty per cent. of Siam's export trade and some sixty-seven per cent. of her import trade is British. Also, Siam is bordered by British Burma on the west and the British Federated Malay States on the south, and Siam is consequently filled with British subjects. The difficulties of securing a new British treaty were, however, proportionate to its importance. The substantial amount of British imports into Siam made British merchants loath to surrender their privilege of the three per cent. tariff restriction; and the large value of British interests in Siam militated against Great Britain's being willing to surrender voluntarily her right of having European legal advisers sit in Siamese courts. The difficulty was increased by the fact that under the 1909 treaty British subjects had already been granted all the rights and privileges enjoyed by native Siamese. Siam had nothing more to give.

[83] Article II.

At the opening interview which Siam's representative had with Mr. Austen Chamberlain late in February, Mr. Chamberlain frankly discussed the difficulties of Great Britain's then granting to Siam full jurisdictional and fiscal autonomy, and confessed that the time seemed premature for such a step. Nevertheless, he listened attentively to the proposals of the Siamese representative, so framed as to uphold Siamese sovereignty and yet afford adequate protection to British interests; and when the true situation in Siam was brought home to him, he promised a reconsideration of the British policy toward Siam and the granting of a new treaty, provided the experts and leading representatives of the Foreign Office, the Indian Office, the Colonial Office, and the Board of Trade could be similarly convinced. As a result of the meetings which followed this interview, a new program of policy was formulated and a treaty finally agreed to, granting to Siam both jurisdictional and fiscal autonomy in the same broad terms as in the American treaty. Since Siam was essentially an agricultural country and would, therefore, never desire a tariff for protection against industrial products, British policy would content itself with Siam's agreeing to a provision limiting for a fixed period the Siamese import tariff to moderate, specified duties on those articles which constituted the bulk of British exports to Siam in return for Great Britain's granting to Siam the fiscal autonomy to which every sovereign nation should be entitled. Similarly, Great Britain would henceforth content itself with relying upon an enlarged right of evocation, terminating with the completion of the Siamese judicial reforms, in place of the requirement of European judicial advisers, which at best were Siamese officials and not under foreign control. In a word, Great Britain, seeing the picture more clearly, would henceforth discard certain fears, more theoretical than real, and choose to rest the future of British trade in Siam upon a large policy of cultivating Siamese good-will rather than upon ironclad treaty restrictions, bound to irritate while they lasted and eventually to be swept away by the inevitable march of progress.

In their main outlines the new British general and commercial treaties were modeled upon the American treaty. Except as to boundary provisions all former treaties were abrogated; the requirement of legal advisers was dropped; all British subjects were to be under the jurisdiction of the ordinary Siamese courts, with the right of evocation until five years after the promulgation of the Siamese codes of law; the grant of fiscal autonomy was made in the same words as in the American treaty; and the new treaties were made terminable by either party after ten years upon one year's notice. These treaties, containing Great Britain's renunciation of her former rights, were given without compensation or price. This statesmanlike move on the part of Great Britain the Siamese have not failed to appreciate. The British general and commercial treaties were signed on July 14, 1925; and a British treaty of general arbitration on November 25, 1925.

In the meantime negotiations were being pushed in other countries.

In late April, after various conferences at Lisbon, the Portuguese Ministry of Foreign Affairs had given its consent to the renunciation of Portuguese extraterritorial rights and had provisionally agreed with Siam's representative upon a treaty draft also closely following the text of the American treaty. In May, Madrid did the same; and in late June, as a result of conferences held at Copenhagen with the Danish Ministry of Foreign Affairs, Denmark also agreed to a new treaty draft, following, except for slight variations due to local conditions, the American treaty. Visits to Stockholm and to Oslo in July produced similar happy results with respect to Sweden and Norway. The new Spanish treaty was signed on August 8, 1925, and the new Portuguese treaty after a somewhat troubled time on August 14th. By this time the Scandinavian treaties were practically completed. Apart from them only the Italian and the Belgian treaties remained. Belgium had already agreed to a new treaty based on the American model, and the treaty text was being worked out in Bangkok. Siam's representative therefore proceeded direct from Madrid to Rome to take up negotiations for a new Italian treaty. Italian interests in Siam are comparatively small, and Italy felt satisfied with the existing arrangements under the old treaties. Nevertheless, after Premier Mussolini's help had been enlisted, obstacles were overcome, and by the end of August, 1925, a new Italian treaty was finally agreed upon, also closely based on the text of the American treaty. The Danish treaty was formally signed on September 1, 1925, the Swedish on December 19, 1925, the Italian on May 9, 1926, the Belgian on July 13, 1926, and the Norwegian on July 16, 1926. With the ratification[54] of these treaties Siam has at last won her long struggle for judicial and fiscal autonomy.

[54] The dates of the signatures and ratifications of the Treaties restoring autonomy to Siam are as follows: United States treaty, signed December 16, 1920, ratifications exchanged, September 1, 1921; Japanese treaty, signed March 10, 1924, ratifications exchanged, December 22, 1924; French treaty, signed February 14, 1925, ratifications exchanged, January 12, 1926; Netherlands treaty, signed June 8, 1925, ratifications exchanged, August 24, 1926; British general treaty and treaty of commerce and navigation, signed July 14, 1925, ratifications exchanged March 30, 1926; Spanish treaty, signed August 3, 1925, ratifications exchanged, July 28, 1926; Portuguese treaty, signed August 14, 1925, ratifications exchanged July 31, 1926; Danish treaty, signed September 1, 1925, ratifications exchanged, March 13, 1926; Swedish treaty, signed December 19, 1925, ratifications exchanged, October 25, 1926; Italian treaty, signed May 9, 1926, ratifications exchanged March 18, 1927; Belgian treaty, signed July 13, 1926, ratifications exchanged, March 25, 1927; Norwegian treaty, signed July 16, 1926, ratifications exchanged, February 9, 1927.

The registration numbers and the citations in the League of Nations Treaty Series are as follows: Japanese treaty, Reg. No. 795, Treaty Series, Vol. 31, p. 187; French treaty, Reg. No. 1055, Treaty Series, Vol. 43, p. 193; Netherlands treaty, Reg. No. 1323, Treaty Series, Vol. 56, p. 57; British general treaty, Reg. No. 1175, Treaty Series, Vol. 49, p. 29; British treaty of commerce and navigation, Reg. No. 1176, Treaty Series, Vol. 49, p. 51; British treaty of arbitration, Reg. No. 1487; Spanish treaty, Reg. No. 1303, Treaty Series, Vol. 55, p. 39; Portuguese treaty, Reg. No. 1304, Treaty Series, Vol. 55, p. 57; Danish treaty, Reg. No. 1131, Treaty Series, Vol. 47, p. 103; Swedish treaty, Reg. No. 1386; Italian treaty, Reg.

Under the provisions of the new treaties, Siam is now free of all the old fiscal restrictions, and has already put into force a new tariff increasing by very slight amounts the tariff on a few widely used commodities, so as to derive sufficient revenue to meet the current needs of the state. Extra-territoriality in Siam is now a thing of the past; and such jurisdictional restrictions as still remain, such as the right of evocation, will cease altogether five years after the promulgation of the Siamese codes. The old, one-sided, irrevocable treaties are gone; and in their place stand modern treaties, freely terminable after ten years by either party. For modern Siam a new era opens.

Progress, irresistible, cannot be stayed by the chains and shackles of unyielding treaty restrictions. If wise statesmanship fails to loosen or remove them, no matter what their strength, they will be forcefully shattered. The outstanding feature in the story of Siam's struggle for autonomy is the open-mindedness and liberality of the Foreign Offices of Europe during the period following the World War, once the issues were made really clear to them. What was inevitable sooner or later has come, not through blood and fighting, but through the method of large-visioned statesmanship and peace. As a result, instead of the folly and waste of war, gain will come to all.

No. 1436; treaty with Belgium and Luxemburg, Reg. No. 1468; Norwegian treaty, Reg. No. 1404.

THE PERMANENCE OF TREATIES

THE DOCTRINE OF REBUS SIC STANTIBUS, AND ARTICLE 19 OF THE COVENANT OF THE LEAGUE

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Starting, as we must start, from the proposition, that in the international sphere, treaties are at any rate no less binding than are contracts in the municipal sphere, may we nevertheless agree that treaties become obsolete, and, if yes, when and in what conditions? Has Article 19 of the Covenant of the League in any way diminished the respect due to treaty obligations? These are questions, which have a special importance at a time when the world has recently been resettled by treaty, and it is worth while to give a little time to their examination. Such an examination may at least serve to clear our ideas, to suggest what are the limits of the doctrine, and to emphasize the necessity, if those limits are to be defined, of a resort to an international court of justice.

The doctrine that we set out to consider is the doctrine that treaties, for the duration of whose obligations so special period is fixed, are not to be understood as binding on the contracting Powers in the event of some material change in the conditions with reference to which they were concluded, the word "conditions" in this statement including not only material, but also moral, facts. For the purpose of the discussion, the phrase "*rebus sic stantibus*" is a convenient catchword: treaty obligations, when the treaty itself is silent, are subject to the provision that, if the obligations are to remain, the essential "things," inanimate and animate, material, moral and mental, must remain in the condition in which they were when the treaty was concluded. But in the absence in the past of any court administering international law, the matter has remained in the realm of theory. We have no decided cases and no "jurisprudence." And international practice has fixed no certain rule.

Still, there has been a general acquiescence in the doctrine that an essential change of conditions involves the obsolescence, that is to say, the supervening invalidity, of treaty obligations contracted with a view to the conditions so changed, so far as those obligations remain executory. The doctrine has commended itself, as we shall see, to lawyers as to philosophers, *nemo in futurum contrahit nisi positis praecedentibus circumstantiis. His enim mutatis totius status etiam mutatur ratio.*[1] The general sense of mankind

[1] Spinoza, *Tractatus Politicus*. III, 14. *Cf.* what Spinoza's commentator said in 1899: "It seems impossible, on any political or ethical principles whatever, to lay it down as an absolute proposition that the obligation of treaties is perpetual. Whence can governments derive the right of binding their subjects and successors for all time by improvident undertaking." Pollock, *Spinoza: His Life and Character*, 2nd ed., London, 1899, p. 307.

supports it; an analogous doctrine of English municipal law may be vouched in its favor. To say that it is not easy to apply this doctrine in practice or to formulate it otherwise than in very general language, is to offer a criticism invariably applicable to the propositions of a legal system, such as the international, which is in an early stage of development.

The doctrine has suffered from its association with what is, in theory at any rate, a very different proposition, namely, the claim sometimes made that a State has a right to liberate itself by unilateral declaration from its treaty obligations. As to that claim, we have, on the one hand, the uncompromising position taken at the London Conference of 1871 by the Powers signatory[2] of the Treaty of Paris, concluded at the end of the Crimean War, "It is an essential principle of the Law of Nations that no Power can liberate itself from the engagements of a treaty, nor modify the stipulations thereof, unless with the consent of the contracting Powers by means of an amicable arrangement,"[3] a principle to which the British Foreign Secretary drew attention when Austria-Hungary, in disregard of the Treaty of Berlin, declared the annexation of Bosnia-Herzegovina in 1908. On the other hand, we find Continental writers[4] of authority declaring that a State may repudiate a treaty when it conflicts with "the rights and welfare of its people," or when it is incompatible with its own development, an incompatibility of which apparently the State concerned is itself the judge. Such declarations, though inspired by idealistic conceptions, would, if accepted, confirm Voltaire's remark that violation is the usual method for the observation of treaties; they may be cited as illustrations of the extravagances to which men are led when they seek a short cut out of a position which they feel to be unsatisfactory, without reflection on remoter consequences. But the doctrine of *rebus sic stantibus* is independent of this controversy, if controversy it can be called.

It must, however, be admitted that the accepted textbooks do not distinguish as clearly as might have been wished between the question whether a treaty ever becomes voidable at the option of one contracting Power, and the question whether, when essential conditions change, the contractual obligation of a treaty is terminated. Thus Hall[5] refers to the doctrine of *rebus sic stantibus* as relating to "the conditions under which a treaty becomes voidable; that is to say, under which one of the contracting parties acquires the right of declaring itself freed from the obligation under which it has placed itself," and he proceeds to state what he calls a "clear principle" as follows: "neither party to a contract can make its binding effect dependent

[2] The Powers at the London Conference were Germany, Austria-Hungary, Great Britain, Russia and Turkey. The French representative appeared only at the last sitting of the conference.

[3] See Hall, International Law, 7th ed., p. 365.

[4] Their names will be found in Hall, *loc. cit.*

[5] Hall, *ubi sup.*, p. 359.

at his will upon conditions other than those contemplated at the moment when the contract was entered into, and on the other hand a contract ceases to be binding as soon as anything which formed an implied condition of its obligatory force at the time of its conclusion is essentially altered."

The reference in this statement to the conditions "under which a treaty becomes *voidable*" at the option of one of the contracting parties appears to be out of place. The voidability of a contract depends, as a general rule, on the discovery by one party of some wrongful act or omission of the other party; and the rescission of a voidable contract does not depend on the existence of any implied term in the contract providing for its exercise. The discovery of a fact existing at the date of the contract entitles one of the parties to destroy the contractual lien, but the lien subsists until it is destroyed.

Indeed Hall, when he comes to state the principle, recognizes that according to it "the contract ceases to be binding," that is, the contract is not voidable, but, as from the date of the supervening alteration in the surrounding conditions, void. Hall's statement in fact in its two branches asserts this avoidance from two different points of view. If conditions arise other than those contemplated when the contract was signed, then, first, from the subjective point of view of the contractants, neither can hold the other to the old bargain; and second, objectively, the contract as a thing existing *in rerum natura* has disappeared. On the sentence as a whole, Westlake observes that "we cannot subscribe to its clearness," though he gives it as a formulation which at any rate shows "how far clearness is attainable."[6] In any event, if it be sought to apply the principle in practice, we are at once confronted with the delicate problems whether any given thing formed an implied condition of the obligatory force of the contract and whether there has been an "essential" alteration.

That problem is, however, a practical problem to be decided on the facts of each particular case, and does not affect the doctrine itself. That doctrine is not that one State has a unilateral right to declare itself not bound by a subsisting contract; it is that the treaty itself has gone, since an essential condition in which it was concluded has disappeared; and this results, either because on the treaty's true construction this is what the parties themselves have intended, or because the very nature of the case requires that the change of an essential condition should have this effect. The treaty in this event is, in fact, not voidable, but dead or "obsolete," if that word be preferred.

Thus, the legal principle of *rebus sic stantibus* is not affected by the doctrine of the London Conference of 1871; that doctrine remains intact. The rule of *rebus sic stantibus* is not a rule giving to a State the right of its own will to tear up a treaty, but a rule either of interpretation or of law according to which in certain events the treaty has no longer any effect. It is not that

[6] Westlake, International Law, Peace, 1st ed., p. 285.

one party has a right to break an existing tie, but that the tie itself is already broken.

A recent case [7] in the Privy Council supplies an apt and direct illustration in municipal law of a doctrine closely comparable to the doctrine of *rebus sic stantibus* in international law,—the doctrine of "frustration," which has in recent years been developing in English jurisprudence. In that case the Judicial Committee, by the mouth of Lord Sumner, spoke thus of frustration and its difference from rescission:

> Frustration operates automatically. What the parties say and do is only evidence, and not necessarily weighty evidence, of the view to be taken of the event by informed and experienced minds.
>
> Language is occasionally used in the cases which seems to show that frustration is assimilated in the speaker's mind to repudiation or rescission of contracts. The analogy is a false one. Rescission (except by mutual consent or by a competent court) is the right of one party, arising upon conduct by the other, by which he intimates his intention to abide by the contract no longer. It is a right to treat the contract as at an end, if he chooses, and to claim damages for its total breach, but it is a right in his option and does not depend in theory on any implied term providing for its exercise, but is given by the law in vindication of a breach. Frustration, on the other hand, is explained in theory as a condition or term of the contract, implied by the law *ab initio*, in order to supply what the parties would have inserted had the matter occurred to them, on the basis of what is fair and reasonable, having regard to the mutual interests concerned and of the main objects of the contract. It is irrespective of the individuals concerned, their temperaments and failings, their interests and circumstances. *It is really a device by which the rules as to absolute contracts are reconciled with a special exception which justice demands.*
>
> There is, however, this point of contact between the two cases. Though a party may exercise his right to treat the contract as at an end, as regards obligations *de futuro*, it remains alive for the purpose of vindicating rights already acquired under it on either side. So with frustration. Though the contract comes to an end on the happening of the event, rights and wrongs which have already come into existence remain, and the contract remains too, for the purpose of giving effect to them.

"Frustration" no doubt would not be a happy term to apply to a treaty; "obsolescence" is better. "Frustration" is a term more appropriate to contracts, in particular commercial contracts, where some particular operation, such as the chartering of a particular ship, is in contemplation, and events, usually some single unforeseen event of overwhelming importance, occurring early in the history of the contract, make the operation impossible; you have in such cases a direct "frustration," a defeat, an avoidance, of the main purpose for which the contract was concluded. But events which,

[7] Hirji Matji and others *v.* Cheong Yue Steamship Co. Ltd., L. R. 1926, A. C. 497, 509. See also the cases connected with the postponement of King Edward VII's coronation, discussed in Pollock on Contracts, 8th ed., p. 439.

after some considerable period, make the provisions of a treaty "obsolete" have the same effect on the contractual lien as events which at an early date destroy it. The determining feature in both classes of case is an unforeseen external event or series of events or a gradual change of conditions. In the case of a treaty the events are usually, if not invariably, events occurring after a long period of years, and therefore affecting only such parts of the treaty as remain executory, and it seems more appropriate to call such a treaty "obsolete." In cases of contracts, in municipal law, where the event happens at an early stage of the history of the contract and the whole or the great bulk of it remains to be performed, the established and the more appropriate term is "frustration."

As already suggested, the doctrine of *rebus sic stantibus*, like the doctrine of frustration in municipal law, may be explained in either one of two ways. We may either say that the treaty, so far as it remains executory (for executed provisions are not affected), is avoided because it must be construed as containing an implied stipulation that in the event of a change of essential conditions it ceases to be binding as from the date of the change, or we may say that *naturaliter*, from the very nature of the case, a contract made with reference to certain conditions disappears when the conditions are gone. An Anglo-Saxon lawyer will perhaps tend to decide the point as one of construction, while the civilian will prefer what may be thought the bolder solution.

To the theory that the matter is one of construction of the treaty, it may be objected that there is a certain artificiality about the argument. The assumption which can readily be made in private transactions, that in the events which have happened the contracting parties, as reasonable beings, could not have contemplated the continuation of the contractual obligation, is not so easily made in international affairs. It is unfortunately not possible to assume as a fact the inspiration of all parties to an international agreement by an underlying intention of reasonableness. And even if States were unwilling openly to avow a contrary doctrine, they would still hesitate to let the test of reasonableness be applied by an organism external to themselves. The fact that treaties are not voidable for duress has a bearing on this point; for a consent obtained by duress is not a true consent in municipal law. If, therefore, in international law the test of the validity of a treaty is not what the parties freely intend, is it reasonable to make an assumption as to their intentions the test whether or not a treaty is to continue in force?

On the other theory, upon the change in essential conditions, the dissolution of the contract follows *naturaliter*, as a natural consequence.[8] This is

[8] See *Digest*, XLVI, 3, *de solutionibus et liberationibus*, 107: "Verborum obligatio aut naturaliter resolvitur aut civiliter. Naturaliter, veluti solutione, aut cum res in stipulationem deducta, sine culpa promissoris in rebus humanis esse desiit . . . ;" and *cf.* XLV, 1, *de verborum obligationibus*, 33, de interitu rei: "Si Stichus, certo die dari promissus, ante diem moriatur, non tenetur promissor." *Cf.* also *ibid.*, 23.

not to make the dissolution depend on the intention of the parties, but to invoke a conception of a general or natural order with which the maintenance of the obligation is inconsistent. If we say that a treaty in certain conditions becomes void "naturally," we are appealing to a general legal conception independent of the intention of the parties, to whose rule we conceive that they are ready, or bound, to submit their relationships. And though it may be true that we moderns regard with suspicion appeals to "nature" or "natural law" as made to a court which exists only as the looking-glass of the contemporary mind, still arguments of this kind are of permanent value for a development of international law in that they involve a reference to a standard set, not by the will or intention of the parties themselves, but by an external authority.

And here, perhaps, a word of caution is necessary. We are not now discussing whether in the international sphere there is any place for the conception of a violation of "public policy," or even of illegality or immorality, which avoids contracts in municipal law. It is possible that there may be a place in international affairs for such a conception. One can discern the existence of something which might grow to such a principle when the "Concert of Europe" at Berlin in 1878 claims to avoid a treaty of San Stefano as inconsistent (whether such was the fact or not is for present purposes immaterial) with the higher interests of the world at large. But such a conception has nothing to do with the doctrine of *rebus sic stantibus*. The effect of such a doctrine is or would be to avoid a treaty *ab initio:* the doctrine of *rebus sic stantibus* avoids a treaty only as from the date of some supervening essential change in the conditions in relation to which that treaty was made. For the purposes of this latter doctrine, the general character—the moral character, if such a phrase is permitted—of a treaty is irrelevant. What has to be established is, not the inconsistency of the treaty with the public interest, but the fact of material change. Avoidance follows such a change automatically, not at the will of one of the parties. After the change of circumstances, the treaty is gone; if it is to be revived, the parties must conclude some new contract to that effect.

Such being the legal nature of the doctrine, what is its practical sphere? Let us repeat here what has been already indicated, but is perhaps not always fully appreciated in general discussions of the doctrine. The obsolescence of a treaty has no effect on such parts of it as have been already executed; obsolescence relates solely to the engagements which are still executory, to whatever still remains to be done or is agreed to be left undone. If cessions of territory have taken place under a treaty, obsolescence has no effect on those cessions. The treaty, in so far as it has operated as an international conveyance, is intact. It is only its operation as a covenant for something still to be performed or not to be performed which is affected. This, be it observed, might not be so if what we were discussing was some doctrine of a right to rescind a treaty, rescission involving so far as possible a *restitutio in*

integrum and restoration of the original *status quo*. A doctrine so revolutionary and dangerous to the public peace has no place in international law.

If then we look for particular instances of treaties to which the doctrine has been applied, we are told [9] that "conspicuous among treaties doomed by their nature to obsolescence are those by which a State defeated in war is obliged to abstain from fortifying or otherwise making free use of some part of its territory, when the restriction is not imposed as forming part of a system of permanent neutrality." And, as an instance, we are given the unilateral prohibition against the fortification of Huningen in Alsace imposed on France by the Treaty of Paris of 1815, "not as a part of the neutrality of Switzerland, but in order to relieve the city of Bâle from anxiety," [10] a prohibition denounced by the French provisional government immediately on the revolution of 1848. Under this same head of provisions for unilateral demilitarization fall the Black Sea clauses, denounced by Russia in 1871, of the Treaty of Paris of 1856. As another instance of an engagement [11] by a State which becomes obsolete on account of a change of circumstances, which in this case are definitely moral rather than material, the case of a concordat with the Holy See, under which a State has the right of nominating Catholic bishops, may be cited. Such an agreement cannot properly survive the complete laicization of the contracting State and its deliberate dissociation from all religious belief.[12]

Again, the doctrine may well be applicable to treaties conferring extraterritorial jurisdiction. May not such treaties become obsolete when the country granting extraterritorial privileges has so far advanced in its judicial and general administration as to render those privileges no longer necessary for the preservation of peaceful intercourse? Thus, the British Government observes in the Memorandum which on the 18th December, 1926, it addressed to the representatives of the Washington Treaty Powers on the subject of the situation in China.

> While calling upon China to maintain that respect for the sanctity of treaties which is the primary obligation common to all civilized States, the Powers should yet recognize both the essential justice of the Chinese

[9] Westlake, International Law, Peace, p. 285, 1st ed. (1904).

[10] Had it been part of the neutrality of Switzerland it would have been in the nature of a part of an international system, and the obsolescence of that system would have had to be demonstrated before the prohibitions in question could have been treated as terminated.

[11] Whether a concordat is or is not technically a "Treaty" is open to argument, the Holy See not being a "State" in the sense in which that word is usually employed in international law (See *e.g.*, the discussion of the point in an article by M. Ruzé on the three concordats with Latvia, Bavaria and Poland, *Revue de Droit International et de Legislation Comparée*, 3rd Series, Vol. VII, p. 45). But a concordat is certainly an engagement entered into by a State with an entity not subject to its own jurisdiction, and there is no reason to apply to it any different doctrines in relation to *rebus sic stantibus* from that applicable to an ordinary treaty.

[12] See Fauchille, *Droit International Public*, Vol. 1, Pt. I, 215 (3).

> claim for treaty revision, and the difficulty under present conditions of negotiating new treaties in place of the old, and *they should therefore modify their traditional attitude of rigid insistence on the strict letter of treaty rights.*

And again:

> The principal objection that will probably be made to this proposal is that in strict logic it would amount to condoning a breach of treaty. This argument, however, does not sufficiently take into account the realities of the situation. The basic facts of the present situation are that the treaties are now admittedly *in many respects out of date*, and that in any attempt to secure revision the Chinese are confronted on the one hand with the internal difficulty of their own disunion and, on the other, with the external difficulty of obtaining the unanimous concurrence of the Powers. . . .
>
> His Majesty's Government attach the greatest importance to the sanctity of treaties, but they believe that this principle may best be maintained by a sympathetic *adjustment of treaty rights to the equitable claims* of the Chinese.

It is obvious that from this line of argument it is only a short step to the admission that a treaty which is "out of date" has ceased to be binding or, in other words, has been "frustrated." If "equitable claims" are in conflict with "treaty rights," it is perhaps permissible to an English lawyer to recall the supremacy of the rules of Equity over the rules of the Common Law. True it is that the "rules of Equity," in the technical sense in which those words are used in English legal phraseology, are very far from being the same thing as "equitable claims," but in origin, at any rate, certain interferences of Equity with rights recognized by the Common Law were based upon a recognition of the fact that the rules of the Common Law were no longer adapted to the conditions of contemporary life.

Another example of the obsolescence of a similar treaty provision is given in Article 435 of the Treaty of Versailles. That article provides:

> The High Contracting Parties, while they recognize the guarantees stipulated by the Treaties of 1815, and especially by the Act of November 20, 1815, in favour of Switzerland, the said guarantees constituting international obligations for the maintenance of peace, declare nevertheless that the provisions of these treaties, conventions, declarations and other supplementary Acts concerning the neutralized zone of Savoy, as laid down in paragraph 1 of Article 92 of the Final Act of the Congress of Vienna and in paragraph 2 of Article 3 of the Treaty of Paris of November 20, 1815, are no longer consistent with present conditions. For this reason the High Contracting Parties take note of the agreement reached between the French Government and the Swiss Government for the abrogation of the stipulations relating to this zone which are and remain abrogated.
>
> The High Contracting Parties also agree that the stipulations of the Treaties of 1815 and of the other supplementary Acts concerning the free zones of Upper Savoy and the Gex district are no longer consistent with present conditions, and that it is for France and Switzerland to

> come to an agreement together with a view to settling between themselves the status of these territories under such conditions as shall be considered suitable by both countries.

We have here a recognition by the surviving parties to the European settlement of 1815 (and by several other Powers who were not parties to that settlement) that certain clauses of that settlement "are no longer consistent with present conditions" (*ne correspondent plus aux circonstances actuelles*),[13] and they therefore accept a modification made by the two Powers directly concerned. The fact of inconsistency with present conditions, or in other words obsolescence, is here established diplomatically. Had the Powers found occasion to refer the matter to a court, a court could equally well have reached a similar conclusion.

In all these cases, if the obsolescence of the treaty is to be justified, the lawyer must say that the conditions which induced the imposition of the obligation have been radically modified when the treaty is proclaimed obsolete, the *res* have undergone a change. It is perhaps most easy to reach this conclusion in the case of a unilateral demilitarization clause. But in the consideration of that case, too, the word *res* must be understood in a large sense, as including not only material but also moral facts, such as in modern conditions the general mentality of a nation, or under the older conditions the general lines of its foreign policy.

Thus, in March, 1848, Lamartine, on behalf of the French Provisional Government, argued or declared in a circular note that

> *Les Traités de 1815 n'existent plus en droit aux yeux de la République française; toutefois les circonscriptions territoriales de ces Traités sont un fait qu'elle admet comme base et comme point de départ dans ses rapports avec les autres Nations. Mais si les Traités de 1815 n'existent plus que comme fait à modifier d'un accord commun et si la République déclare hautement qu'elle a pour droit et pour mission d'arriver régulièrement et pacifiquement à ces modifications, le bon sens, la modération, la conscience, la prudence de la République existent, et sont pour l'Europe une meilleure et plus honorable garantie que les lettres de ces Traités si souvent violées ou modifiées par elle.*

This is perhaps rather a rhetorical passage in which to find a statement of a legal doctrine, but, nevertheless, if one dives beneath the rhetoric, one finds the essentials there. The treaties of 1815 so far as executory are no longer binding, but the territorial cessions which those treaties effected remain as facts and can only be modified by agreement. The reason why the treaties have ceased to have executory force is that there has been a complete change in the moral situation of France. France, therefore, is no longer bound not

[13] It is worth observing that this is not the language of Article 19 of the Covenant. *Post*, p. 99.

to fortify Huningen, should it be her good pleasure to do so, as probably it is not.[14]

Similarly, Russia might perhaps in 1871 have used an argument more plausible than those which she in fact employed for her release from the Black Sea clauses, had she said that these clauses were based on hypotheses which were not permanent features of European politics as subsequent history has shown. In such conditions the Black Sea clauses might be said to be nothing but reminders of a system that was dying or dead. But, indeed, these unilateral demilitarization cases are at best unsatisfactory. No legal or arbitral tribunal ever passed upon them. In the Black Sea case, at any rate, the claim that the treaty was obsolete was not made clearly as a legal proposition distinct from a diplomatic claim.

How is the doctrine to be applied? If a State claims that a treaty is obsolete, is the question a legal question? And if it arose between Powers signatory to the compulsory jurisdiction clause of the Statute of the Permanent Court, would they be bound to submit it to that tribunal?

The answer to the first of these questions would seem to be that while the question whether the doctrine itself is part of international law is eminently a "question of international law," the question in any given case whether a treaty has or has not become obsolete, involves important questions of fact. Thus, the question whether conditions have actually changed since the signature of the treaty is one of historical and contemporary fact, and a fact of this kind is not (though some other questions of fact are) within the language of Article 36 of the Statute of the Permanent Court of International Justice.[15] If conditions are found to have changed, the further question whether the changes are so material as to make the treaty obsolete would seem to be a mixed question of fact and law, and therefore to the extent of the admixture of fact, not within the language of the article. On this basis, even States which have signed the so-called compulsory jurisdiction clause, and which also interpret that clause as imposing an obligation to submit to the Permanent Court all cases where the questions raised fall within the categories of the clause, are not bound by that clause to submit to the court the question of the obsolescence of a treaty. On the other hand, there can be few cases in which it is more desirable that the question at issue, involving as it does delicate considerations and estimates of conduct, should be settled by some well-informed authority which is independent of the Powers directly involved. Such an authority would not necessarily be, or rather should not

[14] Palmerston commented on this circular: "I should say that if you were to put the whole of it into a crucible, evaporate the gaseous parts and skim off the dross, you would find the rule to be peace and good fellowship with other governments." Cambridge Modern History, Vol. XI, p. 106.

[15] "The classes of legal disputes concerning: (a) the interpretation of a treaty, (b) any question of international law, (c) the existence of any fact which, if established, would constitute a breach of an international obligation, (d) the nature or extent of the reparation to be made for the breach of an international obligation."

be, purely legal. The general question of the legal doctrine might be appropriate to a tribunal, but the questions of fact and of mixed fact and law would be submitted more suitably to a board of conciliation. The international jurymen, the ideal man of common sense, would here find a task well suited to his capacity.

It remains to consider whether for States which are members of the League the doctrine of *rebus sic stantibus* has been affected by the Covenant.

First, it must be observed that the preamble to the Covenant declares it to be the object of the Covenanting States to promote international coöperation and achieve international peace and security by (amongst other things) "the firm establishment of the understandings of international law as the actual rule of conduct among governments and by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organized peoples with one another." Thus, a scrupulous respect for treaties is put side by side with the establishment of international law as an actual rule of conduct and with the maintenance of justice, a mode of statement which taken by itself would be not wholly free from ambiguity. For law is not necessarily identical with justice, nor are the demands of justice necessarily identical with the provisions of treaties. The preamble may, however, be taken as not doing more than indicating what all reasonable men would agree to, viz., that international, like civil, justice is normally to be maintained by the observance of existing law and of contractual engagements, subject to something in the nature of a power of amendment by legislative authority; and these suggestions are further developed in Article 19 of the Covenant. This article runs:

> The Assembly may from time to time advise the reconsideration by Members of the League of treaties which have become inapplicable, and the consideration of international conditions whose continuance might endanger the peace of the world.

The article thus couples two distinct ideas,—the "reconsideration" of treaties which have become inapplicable, and the examination of international conditions whose continuance might endanger the peace of the world;[16] but the inclusion of this second branch of the article suggests that the treaties the reconsideration of which is to be suggested must be treaties whose persistence in their unreformed conditions contain the germs of a threat to the peace.

The language of the first part of the article might seem at first sight to take us directly to the doctrine of *rebus sic stantibus;* the treaties whose re-

[16] The French version is not quite the same: "L'Assemblée peut, de temps à autre, inviter les Membres de la Société à procéder à un nouvel examen des traités devenus inapplicable ainsi que des situations internationales, dont le maintien pourrait mettre en péril la paix du monde." According to this text the idea of "nouvel examen" (reconsideration) applies both to treaties and to international situations; in the English it is only treaties which are the subject of reconsideration. The English version clearly gives the better sense.

consideration may be advised are those "which have become inapplicable," *i.e.*, treaties the relation of whose provisions to the facts of international life has changed and whose terms can no longer be applied. Now a treaty which cannot be applied is very like a contract whose further execution has been frustrated: both are instruments which cannot be carried out.

But on consideration, the better opinion seems to be that the article does not involve an appeal to the legal doctrine of obsolescence, and this mainly for two reasons. In the first place, it is doubtful whether the word "inapplicable" can be pressed so far. A synonym for "inapplicable," the dictionary tells us, is the word "unsuitable." If so, we need not go so far as to say that it is completely impossible for any given treaty to be carried out before Article 19 can be brought into play. In the next place, and this is the more powerful argument, the task allotted to the Assembly (it is remarkable that the Council has here no authority) is not to deal with the situation on the basis that the treaty is gone, or even to declare the treaty gone. The task of the Assembly is to "advise" reconsideration, or, as the French text puts it, "inviter les Membres de la Société à procéder à un nouvel examen." This is in no sense the power of a court to declare a treaty no longer binding as being obsolete or "frustrated"; it is merely a political power to give friendly advice.[17] Thus, not only has the Assembly no power to declare the treaty obsolete or frustrated, but the article assumes that the treatycontinues to subsist. If it did not subsist, it could not be made the subject of "reconsideration," which is itself a political process, carried through by the parties.

Thus the first part of the article (which is the only part which refers to treaties) does not give a legal treatment of a legal problem. The doctrine of *rebus sic stantibus* is not directly involved. No doubt it is true that the Assembly must find as a fact that a treaty is "inapplicable" before it advises reconsideration, just as a court must find the necessary facts as to changes of conditions before it declares a contract frustrated, but this analogy has not the effect of turning the Assembly into a court.

That even the first part of the article gives a political power rather than applies or authorizes the application of an accepted legal doctrine is strongly confirmed by the second branch of the article, "the consideration of international conditions whose continuance might endanger the peace of the world." This language goes a little further than the provisions of Article

[17] Whether it can be exercised by a majority or not, is a matter in controversy. Schücking and Wehberg consider that the power is so exercisable. (*Die Satzung des Völkerbundes* 2d ed., p. 663). *Contra* the editor of Oppenheim, International Law, Peace, § 167 (4), p. 229, of 3rd edition, with whom the Chilian delegate to the Assembly agrees (League of Nations, second Assembly, Plenary Meetings, pp. 462, 467). The view of the present writer is, On the whole, that what is wanted is unanimity, with the exception of the countries to whom the advice is given. It can hardly be supposed that both the Powers who are parties to the treaty must concur in the advice; for if they both thought the treaty inapplicable, they clearly would be ready to modify it without invoking the assistance of the Assembly.

11: in the earlier article a "threat of war" or a circumstance which "threatens" a disturbance of peace or of the good understanding between nations, is the condition of action; under the second half of Article 19 the mere possibility of a danger to the peace of the world from existing international conditions, without necessarily any reference to a treaty, is sufficient to justify an application to the Assembly. Clearly in this part of the article we are removed even further than in the first part from legal doctrines. If you are considering international conditions "whose continuance might endanger the peace of the world" you are not limited to treaties the executory clauses of which one party asserts to be obsolete. You are to take a wide political view of the world as a whole. You may even advise new cessions or retrocessions of territory which would not come within the sphere of any application of the more humble legal theory.

These views are advanced with diffidence, as they are not wholly in agreement with the opinion given in 1921 at the second meeting of the Assembly of the League, by a committee of three distinguished jurists (MM. Scialoja, Italy; Urrutia, Colombia; and de Peralta, San Domingo) in connection with the dispute between Chile and Bolivia. The committee observed [18] that the advice of the Assembly "can only be given in cases where treaties have become inapplicable, that is to say, when the state of affairs existing at the moment of their conclusion has subsequently undergone, either materially or morally, such radical changes that their application has ceased to be reasonably possible, or in cases of the existence of international conditions whose continuance might endanger the peace of the world. The Assembly would have to ascertain, if a case arose, whether one of these conditions did in point of fact exist."

With the two doctrines laid down or implied in this opinion, I would at once and respectfully concur. The three distinguished jurists will command general assent to their insistence that in a case of this kind, the Assembly must go very cautiously and that its first duty is to find the facts. It must not call a treaty "inapplicable" without a serious preliminary enquiry. Next the jurists render a real service to international law when they suggest that the doctrine of *rebus sic stantibus* applies to moral as well as material conditions. It might in fact be better stated as the doctrine of *rebus aut personis sic stantibus*. A moral change in the spirit of a people may, if sufficiently evidenced, justify a finding that certain provisions of a treaty are obsolete.

It need hardly be insisted that this reference to a change in moral conditions or in persons is not intended as a suggestion that a change in the government of a country has in and by itself any influence on its treaty engagements. The classical debate on this subject was held in America in 1793 when President Washington submitted to his cabinet, among other points relating to Franco-American relations, the question whether the United

[18] League of Nations, second Assembly, Plenary Meetings, p. 446.

States were obliged to consider the treaties previously made with France as in full force.[19] The opinion of Jefferson and Madison, that the internal changes in France had not affected the binding force of the treaties, prevailed against that of Hamilton, who argued that the United States "had an option" to consider the treaties as provisionally suspended and would eventually have the right to renounce them "if such changes should take place as could *bona fide* be pronounced to make a continuance of the connections which resulted from them disadvantageous and dangerous." [20] Hamilton's argument would seem to have been based on the idea that a change of government was in itself a change in the essential conditions of the Franco-American treaties. And, of course, a treaty might conceivably have been, or be, concluded with such a special reference to an existing government that a change in the form of government would be a change in an essential condition of the contract. For example, a pact inspired by the idea of the Holy Alliance to furnish troops in support of the government of a country would lapse if that government wholly changed its character.

But it may be permitted to feel some doubt whether, on the true construction of Article 19, it is a condition precedent of advice to reconsider treaties that the Assembly should find that the state of affairs which existed when they were concluded has undergone "materially or morally" such radical changes that their application has ceased to be reasonably possible, or in the even more stringent language of the French version of the opinion that "*il est hors du domaine des possibilités raisonnables de les appliquer.*" For this seems hardly to give sufficient weight to the very wide language of the second branch of the article; and it is conceivable that the continuance of a treaty legally unassailable might endanger the peace of the world.

It is obvious that the Assembly is not a body which by its constitution is well adapted to put into force a legal doctrine, and it is doubtless for this reason that, consciously or unconsciously, Article 19 has not been drafted on strictly legal lines. If, however, the Assembly, before proceeding to exercise its power of advice under Article 19, should wish to inform itself on the question whether a treaty can be considered to be obsolete as a matter of law, it would be natural that it should resort to the Permanent Court of International Justice under Article 14 of the Covenant and ask for an advisory opinion.

But indeed, to attempt exactly to define the conditions contemplated by Article 19 is perhaps useless labor. Even if the whole Assembly (with the exception of the parties interested) is unanimous in advising the reconsideration of a treaty, the pressure applied to the recalcitrant contracting Power is moral pressure only; no legal obligation to revise the treaty has been created. If it is desired to contend as a legal proposition that a treaty is no longer

[19] See Moore, International Law Digest, Vol. V, p. 335 and following, and Hirst, Life and Letters of Thomas Jefferson, Macmillan, 1926, pp. 312–3.

[20] Moore, *ubi sup.*, p. 336.

binding because essential conditions, moral or material, have changed, the forum to which resort must be had is not the Assembly, but the Permanent Court. The ground covered by Article 19 is not that of the doctrine of *rebus sic stantibus*. The importance of the article from the international lawyer's point of view is that it indicates a growing consciousness of the need of having in reserve a power, which even if for the present it acts by persuasion is in essence a legislative power, to modify not merely existing international contractual obligations, but international conditions generally in the interests, not merely of the parties to a treaty, but of the whole international community. Such a task is for the statesman rather than the lawyer.

To sum up:

There is no legal doctrine which allows treaties to be observed with greater laxity than ordinary contracts in municipal law. On the contrary, treaties in international law cannot be simply disregarded by the contracting Powers themselves for reasons, such as duress or "public policy," on which contracts in municipal law may be avoided. Respect for treaties is a fundamental condition of an orderly and peaceable international life. If they are to be altered or reformed, this must be done in existing conditions by a process of conciliation voluntarily accepted, a process equally applicable to all international relationships. The doctrine of the obsolescence of treaties, the doctrine, that is, that their executory clauses have effect only so long as the essential conditions in which they were concluded remain, is not a substitute for those general powers of inducing international changes which are indicated in Article 19 of the Covenant.

The doctrine of the obsolescence of treaties is analogous to the doctrine of frustration in British municipal law. Like that doctrine "it is really a device by which the rules as to absolute contracts (obligations) are reconciled with a "special exception which justice demands."[21] It is a legal, not a diplomatic doctrine. It means that when the essential conditions in which a treaty was concluded have changed, the obligations in that treaty which still remain to be executed have lost their force. It is not a doctrine that one State may by unilateral declaration rescind or modify its obligations. If it is to be put into force, the proposition that the essential conditions have changed needs either the assent of all parties interested in the obligation or the decision of a tribunal. The occasions for putting it into force will in the nature of things occur only rarely; if statesmanlike wisdom were always exercised in the conclusion of treaties, such occasions would never occur.[22] It is only a seeming

[21] Judgment of the Judicial Committee of the Privy Council in Hirji Matji and others *v.* Cheong etc. Steamship Co. Ltd., *anie*, p. 92.

[22] *Cf.* J. S. Mills' remarks in the Fortnightly Review, Vol. VIII, U. S. (1870), p. 715 (quoted from Moore, International Law Digest, Vol. V, p. 349): "Nations should be willing to abide by the rules. They should abstain from imposing conditions which, on any just and reasonable view of human affairs, cannot be expected to be kept. And they should conclude their treaties as commercial treaties are usually concluded, only for a term of years

and not a real exception to the general rule of the sanctity of treaties, for it gives effect either to what the parties themselves are taken to have intended, or to what the general common sense of mankind, which we here personify as "Nature," considers to be the true result of their bargain. Article 19 of the Covenant is rather evidence of the necessity of the doctrine than an attempt to put it directly into force by legal means. If the doctrine of *rebus sic stantibus* then is rightly understood, it has a proper but perhaps not a permanent place in the edifice of a sane international law.

. . ." (written with reference to the Russian denunciation of the Black Sea clauses of the Treaty of Paris).

REVOLUTIONARY ACTIVITIES BY PRIVATE PERSONS AGAINST FOREIGN STATES[1]

By H. Lauterpacht, LL.D.

Revolutionary acts and preparations are liable to punishment by the criminal law of the community against which they are directed, and belong as such to the domain of municipal law. They become a matter of direct importance to international law when the menaced state finds that the efficacy of its laws and the possibilities of peaceful internal development are being frustrated by revolutionary propaganda or by acts of rebellion coming from abroad. Such acts may, when brought to consummation within its territory, be punished with all the rigor of the law. But the probability of their suppression is diminished and the chances of their success are enhanced as a result of their being hatched out and prepared under cover of the territorial supremacy of another state. It happens thus that what one state believes to be its internationally recognized right of peaceful existence is put in danger in consequence of another state's right to exclusive jurisdiction over its territory, a right, in turn, fully protected by international law. We get over the difficulty, for a while, by bringing to our

[1] The problem of state responsibility for revolutionary activities by private persons against foreign states has in the years following the World War become, once more, a matter of international importance. One of the consequences of the substitution, in a number of countries, of the democratic form of government for different types of dictatorship was the growth of revolutionary activities conducted from abroad against the régimes thus established and, as a result, a series of demands put before foreign states and calculated to safeguard the security of the menaced governments. As will be shown later, many European states and the United States of America have been in the last hundred years confronted with similar demands. However, the present situation is to a large extent complicated by the fact that, alongside revolutionary activities of private persons, another problem has come to the foreground, namely, that of revolutionary acts and propaganda originating directly from a government and aimed at a foreign state—a problem which lies outside the scope of the present article. There is a possibility that the severity of condemnation which naturally attaches to this latter kind of illegal interference with the independence and the constitution of foreign states might warp the judgment of the international lawyer when engaged in determining the extent of state responsibility for revolutionary acts of private persons. The danger of being misled by a superficial analogy is the greater as text-book writers either pass lightly over this subject or indulge in vague generalities. It is intended to present in this article the theoretical argument and to collect the relevant facts as a starting point for a future detailed enquiry into this rather neglected branch of the doctrine of state responsibility.

It will also be observed that the question dealt with in this article covers only one aspect of the vaster subject usually referred to as delicts against foreign states and embracing such topics as violations of neutrality, libelling foreign sovereigns, acts of violence against heads of foreign states and foreign diplomatic envoys, insults to the flag of friendly states, and the like. These offences are here referred to only so far as they bear directly on the subject under discussion.

mind the fact that territorial supremacy being a sum of rights granted by international law, the very conception of the law of nations requires that it should be made use of in a manner compatible with the respect due to equally recognized rights of others. However, "respect" is a word capable of a variety of meanings. It may range from the abstract duty of non-interference to a positive duty of protection. Is it the formal right to choose and to retain, while free from interference *by other states*, such a constitution and such a government as the nation pleases that is recognized by international law, or is it the right to protection against *whomsoever* of the existing government and constitution? Accordingly, is the duty of respect incumbent only upon the state as such, or does reciprocal recognition go so far as to impose upon it the duty to prevent all treasonable acts against a state with which it is at peace? This distinction is not a purely theoretical one. For while the duty of respect extends to the state solely and exclusively, that of protection carries with it the obligation to restrain private individuals from a certain line of conduct. Respect and protection thus conceived are not interchangeable terms. There are interests which international law safeguards only to the extent of imposing restrictions upon the freedom of the state's own action without in any way obliging it to exact a similar measure of restraint from its subjects. Indeed, the entire law of neutrality is based on a differentiation of this kind.

It would seem, therefore, that the right to protection as against private individuals cannot be deduced from the rights inherent in the international personality of states, but only from the principle, if there be such one, that the legal system embodied in the constitution of a particular state is part of the international legal order and, accordingly, an interest which states are under a duty actively to defend against all attacks. Such a principle, however, is a postulate which, far from being a generally accepted rule of international law, must still be proved by reasons more cogent than theoretical deductions from the fundamental rights of states. For it will be observed that although the growing solidarity, legal and otherwise, of the international community requires that what is stamped in one state as a crime should not be left unpunished within the borders of its neighbor, there are nevertheless weighty exceptions to this rule, the most important flowing from the attitude of modern states with regard to political offences against foreign governments. The legal consequences of the postulated unity of law are limited in extent and of doubtful application to treasonable acts against foreign states.

On the other hand, it is equally clear that a state is entitled to expect that the exclusiveness of other states' jurisdiction over their territory will not result, even indirectly, in a serious menace to its existence and safety. For it is only and alone the respect for the sovereignty of the neighboring state that induces the menaced state to refrain from invading the territory of its neighbor in order to put an end to an impending danger. But it will,

in the long run, be impossible to maintain that attitude of self-restraint, if the neighbor shows no consideration for the vital interests of the threatened state. A menace of this kind constitutes, according to an almost unanimous consensus of opinion, a perfectly good ground for intervention.

The above considerations, showing as they do the difficulties involved in the question, suggest at the same time the way in which its solution should be approached. It consists in the possibly exact determination of the nature of acts which may give just cause for complaint or for a demand for redress. American publicists, while pointing to the clear rules of that part of the neutrality laws of the United States and of Great Britain which relate to hostile expeditions, express the opinion that the laws of other countries fall short, in this respect, of the fulfilment of a clear international duty. And yet hostile expeditions constitute only one class of possible hostile acts of a revolutionary character, and Continental writers, far from admitting the inferiority of their own laws, express the view that the common law countries have remained, so far as the protection of foreign governments is concerned, in a rudimentary stage of law incompatible with the requirements of international solidarity. In fact, it is by no means certain that of all revolutionary acts coming from abroad hostile expeditions constitute the greatest danger. At least, they present an open menace which, given the means, can be repelled by force. But the menaced state is to a considerable degree powerless against revolutionary propaganda generated abroad, possibly spread from the air by means of publications or broadcast by wireless, inciting its population to armed revolt and its troops to rebellion; against revolutionary organizations formed abroad with the view to assisting an actual or impending revolt in their mother country; against moneys being subscribed or lent, or other assistance given, for such purposes. What protection, if any, from such acts falling short of hostile expeditions does international law afford, and what duties, if any, does it impose upon the state from whose territory such acts originate? The sweeping statement, so frequently encountered, to the effect that international law imposes upon states the duty to prevent, within their territory, *all* acts injurious to their neighbors, is superficial and misleading. It must necessarily result in the answer to the question being determined by purely political factors, *e.g.*, by the enforced submissiveness of weak states or by opportunistic arrangements of mutual insurance between reactionary states or between revolutionary governments of precarious standing.

The answer must be sought in the practice of states, both internal as evidenced in that part of their municipal law which deals with offences against foreign states, and external as shown in international incidents and negotiations. The municipal legislation which protects foreign governments and constitutions do so, so far as they go, with the view to avoiding conflicts with other states. But the principle of preservation of peace is, when taken as a measure of international obligation, both defective and

highly relative. Different countries pay a different price for their peace. A state will usually succeed in exacting from a weak country a measure of vigilance the mere demand for which would be rejected by its more powerful neighbor as an act of intolerable interference. And a reactionary government will be prone to see a danger of external complications in activities which a more progressive government will hardly regard as meriting attention. Here lies the reason why different criminal codes, although starting from the same premises, arrive at solutions diametrically opposed to one another. There is a curious kind of *renvoi* in this matter. The international lawyer looks, as he is bound to do, to municipal legislation as showing what is the legal conviction of states on this matter. But the laws of different countries obviously start from the consideration that acts should be prohibited which might bring about a declaration of war, or expose the country or its citizens to reprisals, or embroil it with other Powers, and, generally speaking, all such acts as are contrary to international law. He is thus brought back to the beginning of his search, seeing that it is for international law to decide which acts may legitimately cause a declaration of war or give just offence to other states.

REVIEW OF AUTHORITIES

Text-books and treatises on international law do not as a rule refer specifically to the question of state responsibility for revolutionary acts by private persons against foreign states.[2] They mention it incidentally when discussing problems of neutrality, of intervention, of fundamental rights and duties of states, or of non-extradition of political criminals. There is a tendency, or rather a habit, to include revolutionary activities within the more general designation of hostile acts against foreign Powers, and to speak indiscrimi-

[2] On the other hand, valuable references to the subject will be found in monographs and articles dealing with hostile acts against foreign states in general, or, within a more restricted scope, with the question of hostile expeditions. The more important may here be mentioned: Lewis, On Foreign Jurisdiction and Extradition of Criminals (1859), pp. 70 *et seq.;* Heinze, *Archiv für preussisches Strafrecht,* XVII (1869), espec. pp. 743–750; Lammasch, *Zeitschrift für die gesamte Strafrechtswissenschaft,* III (1883), pp. 376–440; Clunet, *Offenses et actes hostiles commis par des particuliers contre un Etat étranger* (1887), and in *Journal de droit international privé,* XIV (1887), pp. 5–21; Craies, *ibid.,* XVI (1889), pp. 357–380; *Gastfreundschaft und Hausrecht der Schweiz* (1889); Wheeler, Foreign Enlistment Act, 1870, with Notes on the Leading Cases of this and the American Act (1896); Olivart, *Revue générale de droit international public,* V (1898), pp. 499–518; Perrinjaquet, *ibid.,* XVIII (1911), pp. 666–675, and XIX (1912), pp. 344–349; Fenwick, The Neutrality Laws of the United States (1912), pp. 81–88, 124–125; Curtis, American Journal of International Law, VIII (1914), pp. 1–37, 224–252; Fick, *Gerichtssaal,* LXXXVII (1919), pp. 76–97; and, above all, Gerland, *Feindliche Handlungen gegen befreundete Staaten,* in *Vergleichende Darstellung des deutschen und ausländischen Strafrechts* (1906), Part I, pp. 113–255. For the literature dealing with the relevant parts of the criminal law in individual countries *see* the works referred to in the following section.

nately of international law as imposing upon states the duty to prevent the commission of such acts within their territory.[3]

Nevertheless, the student inquiring what, in the opinion of those writers, is the meaning of "hostile acts" will be able to distinguish two sets of opinions. According to one view, the duty of prevention and suppression extends to all acts injurious to other states; according to the other, the circle of such acts is strictly limited and embraces mainly organized acts of force.

Thus we find Liszt expressing the opinion that every member of the family of nations is under a duty to oppose within its territory *all* attempts, by its own subjects or by foreigners, against the interests of foreign states.[4] Calvo asserts categorically that international law imposes upon the state the duty to prevent its subjects from committing acts prejudicial to the interests of friendly nations, and to oppose plots and conspiracies of any nature whatsoever likely to disturb their security.[5] Rivier is emphatically of the view that mere toleration of propaganda against the political institutions and the territorial integrity of friendly states constitutes a violation of a clear rule of international law.[6] This is also the opinion of Pradier-Fodéré.[7] Fauchille's comprehensive treatise bristles with general statements to the effect that it is the duty of the state "to prevent within its territory plots, conspiracies and in general all attempts against a foreign Power."[8] De Louter's view is no less sweeping.[9] Recently, in his enumeration of the fundamental juridical duties of states, Alvarez emphasized the duty to prevent conspiracies against the security and the public order of other states.[10] And Redslob goes the length of construing as a measure of authoritative intervention the mere toleration of such attempts.[11]

On the other hand, British and American writers mention less frequently the duty to protect the government and the public order of foreign states. They too speak of hostile attempts, but it is obvious that they refer here mainly to organized acts of force directed against foreign territory. This appears clearly from Phillimore's treatment of the subject in his chapter on self-preservation. It is only actual invasion or threat of invasion by rebel

[3] See, for instance, Oppenheim, International Law, 3rd ed. (1920), I, § 124 (duties resulting from territorial independence), § 164 (state responsibility), § 316 (right of asylum).

[4] *Völkerrecht*, 12th ed. by Fleischmann (1925), p. 118. This view is shared by almost all German writers. *Cf.* especially Bluntschli, *Das moderne Völkerrecht* (1868), §§ 396, 398; Heffter, *Das europäische Völkerrecht der Gegenwart*, 8th ed. (1888), § 63a; Triepel, *Völkerrecht und Landesrecht* (1899), p. 340. But *see* Schön, *Die völkerrechtliche Haftung der Staaten aus unerlaubten Handlungen* (1917), p. 69, 70.

[5] *Le droit international*, 5th ed. (1896), III, § 1298; also I, § 108. See also Olivart, *op. cit.*

[6] *Principes du droit des gens* (1896), I, p. 266.

[7] *Traité* (1885–1906), I, §§ 238, 260.

[8] *Traité*, I, Part 1 (1922), No. 255; see also Nos. 245, 256, 295, 295(1), 441(24), 472.

[9] *Le droit international public positif* (French translation, 1920), I, p. 244.

[10] Quoted by Fauchille, No. 295.

[11] *Histoire des grands principes du droit des gens* (1923), p. 511. See also Hettlage, *Zeitschrift für Völkerrecht*, XXXVII (1926), p. 25.

forces which must be prevented, and it is only in cases like those that the menaced state is justified in having recourse to measures flowing from the right of self-preservation.[12] Hall speaks of the state's duty not to lend "the shelter of its independence to persons organising armed attack upon the political or social order elsewhere established."[13] Moore's statement is even more guarded. Referring to the duty of obedience to the law which political refugees owe to the country granting asylum, he points out that they are subject to such measures "as the government may lawfully adopt to prevent the national territory from being used by any persons as a base for criminal or hostile enterprises."[14] But it will be seen later that the scope of measures which the government of the United States may lawfully adopt in this connection is not too wide, and that the conception of "criminal enterprises" is here subject to a specifically restricted interpretation. It may be said at this stage that the very dearth of British-American authority, so far as text-books are concerned, is indicative of the general attitude of the two countries on this matter.

The Institute of International Law adopted in 1900 a Resolution on the Rights and Duties of Foreign Powers as regards the Established and Recognized Governments in case of Insurrection.[15] Section 3 of Article II of the resolution laid down that it is forbidden for foreign Powers to allow a hostile military expedition against an established and recognized government to be organized within its territory.

It appears that only once was an international tribunal confronted with this problem. In the first case which came before the Central American Court of Justice (created in 1907 between the five Central American Republics), Honduras and Nicaragua charged Guatemala and Salvador with fomenting revolution in Honduras and with unneutral conduct in respect of the insurrection which had broken out in that country. Both charges were alleged to have been in violation of the conventions concluded in 1907 between the five republics. In July, 1908, the court issued an interlocutory decree instructing the defendant governments to refrain from acts which might imply direct or indirect interference with the revolution in Honduras and to confine in one place emigrants suspected of a hostile attitude towards the Honduran Government.[16] In the final judgment, given in December, 1908, the court held, by a majority of votes, that neither

[12] Commentaries upon International Law, 3rd ed. (1879–1889), I, §§ 214–220. See also § 369 which, however, should be read subject to the above interpretation of "hostile attempts."

[13] International Law, 8th ed. by Higgins (1925), § 8. See also *ibid.*, §§ 13 and 63.

[14] Digest, II, § 221; see also his Treatise on Extradition (1891), p. 7, and Field, Code (1872), § 207.

[15] *Annuaire*, XVIII (1900), p. 227; Resolutions of the Institute, ed. by J. B. Scott (1916), p. 157.

[16] American Journal of International Law, II (1908), p. 838.

Salvador nor Guatemala were guilty of the charge brought against them.[17] In particular, the court held that the mere fact of a prejudice to the interests of the foreign state is not sufficient to create responsibility. It demanded a proof of either intentional malice or culpable negligence.[18]

MUNICIPAL REGULATIONS

The wide divergence of opinion between international publicists is to a large extent due to the fact that the criminal laws of various countries differ widely on this point. And yet at first sight it is rather surprising that any considerable divergence of legislative practice should have taken place at all. For the relevant provisions in different legislations can be traced to one common source, namely, to the wish to preserve the external peace and safety of the legislator's own country. The Roman law punished any one "*cujusve opera dolo malo . . . ex amicis hostes populi Romani fiant.*"[19] In the formative period of international law that consideration was given additional weight as a result of the then prevailing practice based on the principle of collective responsibility. The unfriendly act of the alien individual was imputed to the foreign community or to any of its members. This state of affairs constituted a powerful obstacle in the way of peaceful intercourse, and frequent attempts were made to put an end to it. International publicists contributed their share by introducing the Roman law doctrine of culpability as a condition of international responsibility, a doctrine which, first propounded by Grotius, remains today the basis of this branch of international law, notwithstanding the attempts at its replacement by the modern positivist theory of absolute responsibility. In addition, numerous treaties regulated or forbade altogether the use of reprisals as based on the principle of collective responsibility.[20] But one of the most efficacious remedies lay in enacting laws providing for punishment of individuals committing acts injurious to foreign states. We find at the end of the seventeenth century orders issued by the King of England forbidding English subjects to enlist in the service of foreign rulers or to assist the rebels of a foreign prince.[21] It is the interest of commerce and peace that lies at the origin of the old rule of common law which stamps as a criminal offence the commission of acts calculated to disturb the amity between England and a foreign Power. This motive is frequently referred to in judicial decisions, in formal indict-

[17] Martens, *N.R.G.*, 3rd ser., V, pp. 325–358. The final conclusions of the judgment are printed in the American Journal of International Law, III (1909), pp. 434–436.

[18] See also the award of the American and British Claims Commission under the Treaty of May, 1871 (Moore, Arbitrations, IV, pp. 4042–4054).

[19] 4 *Dig. ad L. Jul. Maj.* (48, 4).

[20] *Cf.* Art. 14 of the treaty of July 8, 1670, between Great Britain and Spain (Hertslet, Treaties, *etc.*, II, p. 198).

[21] *Cf.* Holdsworth, *A History of English Law* (1924), VI, p. 308.

ments before courts of justice, and in utterances of statesmen.[22] The same applies to other countries. The Criminal Code of Maria Theresa enacted that higher punishment should be meted out to those responsible for such libellous publications as tended to disturb the external peace of the state.[23] In the Dutch Act of 1816 which introduced penalties for acts injurious to foreign states, the main motive which inspired the legislator is described as *"l'intérêt . . . qu'il y a de prévenir tout ce qui pouvait causer de l'animosité ou de l'aigreur entre les puissances."*[24] Passages of this kind will be found in the numerous German Codes at the beginning of the nineteenth century which provided for penalties for such offences.[25] When, after the French Revolution, the non-extradition of political offenders became a general rule, the same considerations of peace acted as an additional reason for introducing legislation against refugees using the territory of the state granting asylum as a base for designs likely to engage its international responsibility.

The reason why out of this common origin of protection granted to foreign states rules have evolved varying so largely from country to country lies in the circumstance that their *rationale*, namely, the considerations of peace, has worked in a different way in relation to different countries. In fact, as a measure of international obligation this reason is now of purely historical importance. Born out of the uncertainties of international life in the formative period of international law, it has been subsequently defined in more detail, and partly deprived of its original character, as a result both of a clearer conception of international duties of the state and of the working of several other important factors. Some of these factors may be mentioned here: States with advanced institutions and with a democratic and progressive form of government will not and have not been eager to protect foreign governments and constitutions more than is absolutely necessary. On the other hand, reactionary governments are ready, with characteristic solidarity, to offer a large measure of protection in order to ensure by reciprocal arrangements equal security for themselves and to inculcate in their subjects the principles of legitimacy and constitutionalism. Revolutionary governments of precarious standing, menaced in turn by subversive designs, will be apt to demand and willing to concede an extended protection, while countries with a well-established government will remain foreign to such considerations. Powerful States will successfully resist exaggerated foreign demands for repressing plots and conspiracies against their neighbors; weak communities, otherwise of a democratic and tolerant disposition, will be driven

[22] *Cf.* the judgments in R. *v.* Peltier, R. *v.* Vint, Reg. *v.* Jameson, R. *v.* Antonelli and Barberi—all referred to below; Sir G. Grey, Hansard, Parl. Deb., Vol. 115 (1851), p. 885; Lord Lyndurst, *ibid.*, Vol. 124 (1853), p. 1046; Attorney-General, *ibid.*, Vol. 148 (1858), p. 1823; Gladstone, *ibid.*, Ser. III. Vol. 215 (1873), pp. 634, 891.

[23] Article 101, § 8.

[24] Quoted after Fick, *op. cit.*, p. 82.

[25] *Cf.*, for instance, *Allgemeines Preussisches Landrecht*, Part II, 20, §§ 135, 136.

by threats and pressure to a submissive attitude of repression and to excessive vigilance both in legislation and in practice.

As a result of the operation of these divergent factors the following three systems have been evolved:

(a) The Anglo-American group based on the principle of neutrality;
(b) The German-Austrian-Russian system (partly applied in South and Central America) closely resembling a system of mutual insurance;
(c) The Latin group, which may be described as a reference back to international law.

(a) *The Principle of Neutrality*

In this group, the duty of the state is assimilated to that arising out of the position of neutrality. Two fundamental consequences flow from this principle. One is the rigid distinction between the duties of the state as such and those of its subjects. This means that whereas the state itself is prohibited by international law from committing acts amounting to assisting revolutionary movements abroad, its subjects are not, with one exception, so prohibited. The second is that, in consequence of that exception, private persons are forbidden by municipal law, enacted in performance of a clear international duty, from committing such acts as amount to making the national territory a base for military or naval operations against a friendly state. Further than this the international duty of the state does not go, with the exception, of course, of the obligation to prevent and to punish certain common crimes which will be mentioned later; further than this the duties of the subject under municipal law do not go.

Great Britain. Conspiracies, plots and treasonable practices against foreign states are not punishable under the law of England, except when they are related in certain special ways to the common crime of murder, or when they amount to levying war against a Power at amity with this country, *i.e.*, unless they fall within the scope of Sections 11 and 12 of the Foreign Enlistment Act of 1870. This Act, which is an amended and enlarged restatement of the Act of 1819,[26] is described as "An Act to regulate the Conduct of Her Majesty's Subjects during the Existence of Hostilities between Foreign States with which Her Majesty is at Peace." Although it is primarily a measure of neutrality in wars between third Powers, Section 11, which constitutes a new feature of the Act of 1870, relates equally to times of peace and war. It provides that any person engaged in fitting out or in the preparation of a naval or military expedition to proceed against the dominions of any friendly state, or assisting therein or employed in any capacity in such expedition, shall be guilty of an offence against the Act and shall be punishable by fine and imprisonment. According to Section 12, any person who aids, abets, counsels or procures the commission of any offence against the

[26] For a history of the British Neutrality and Foreign Enlistment Acts, see Phillimore, III, § 146, and Wheeler, *op. cit.*, pp. 15–18, 22–26.

Act shall be punished as a principal offender. It appears from the two cases decided subsequent to the passing of the Act that the courts do not shrink from giving an extensive interpretation to this section in the interest, as they repeatedly point out, of the maintenance of friendly relations with foreign Powers. Thus it has been held that it is not necessary that the expedition should be completed in this country, and that it is sufficient if the offence originated here;[27] that the offence is completed whether the expedition has or has not in fact proceeded;[28] and that it is even not necessary that an attempt should be made to overthrow the government, and that an expedition within the meaning of the Act is one which intends either by actual force or by show of force to interfere with the constitution, government, law or administration of a foreign state.[29] Apart, however, from hostile expeditions, the criminal law does not prohibit subscriptions and loans in aid of revolutions in foreign countries, although it appears that contracts arising out of transactions of this kind are illegal and incapable of enforcement in an English court.[30]

With regard to such activities of a revolutionary character as assume the form of attacks in print against the person of foreign sovereigns, it was laid down in several cases at the end of the eighteenth and at the beginning of the nineteenth century that publications tending to degrade, to revile and to defame persons "in considerable situations of power and dignity in foreign countries" may, as calculated to embroil this country with foreign Powers, be taken and treated as libels.[31] However, it is believed that the rule enunciated in these cases and now rather indiscriminately referred to in textbooks as expressive of the existing law, should be read in the light both of the special circumstances of its origin and of the now obtaining conceptions of the freedom of the press and of expression of opinion. It was stated in a com-

[27] R. *v.* Sandoval, 3 T. L. R. 411, 436. See also, before the passing of this Act, Reg. *v.* Granatelli (1849), 7 State Trials, New Series, p. 1026.

[28] Reg. *v.* Sandoval, quoted above.

[29] Reg. *v.* Jameson, 12 T. L. R. 551.

[30] Demetrius de Wütz *v.* Hendricks (1824), 9 Moo. 586; Thompson *v.* Barclay (1831), Coop. Pr. C. 501; Thompson *v.* Powles, 25 Sim. 194; and the American case Kennett, *et al. v.* Chambers, 14 How. 38, and Scott, Cases (1922), p. 893. The limited scope of this article does not permit an examination of the legal bases of this rule, whose origin is obscure. The writer believes that the effect of the two first mentioned cases has been frequently overestimated, and that it owes its origin to an unduly extensive interpretation of the rule that an unrecognized foreign government cannot sue before an English court: City of Berne *v.* Bank of England (1804), 9 Ves. Jr. 347; Jones *v.* Garcia del Rio (1823), Turn & R. 296. *Cf.* here also Scott, Cases, p. 901, note; Pitt Cobbett, Cases, 4th ed. by Bellot (1924), II, p. 498; Westlake, International Law, 2nd ed. (1913), p. 252. For a more correct statement of the law see the speech of Gladstone, as advised by the Law Officers (Hansard, Parl. Deb., Ser. III, Vol. 215 (1873), pp. 634, 897) in the matter of subscriptions in aid of Spanish Carlist revolutionaries. *Cf.* also the Law Officers' opinion in 1823 (printed in Phillimore, III, Appendix X).

[31] R. *v.* Peltier (1803), 28 State Trials, p. 529; R. *v.* Vint (1799), 22 State Trials, p. 627.

paratively recent case[32] that not all publications against foreign governments constitute criminal libel. Phillimore, J. (as he then was), delivering judgment in this case, said:

> Seditious libels are such as tend to disturb the government of this country, and in my opinion a document published here, which was calculated to disturb the government of some foreign country, is not a seditious libel, nor punishable as libel at all. . . . To hold otherwise . . . would make our great statesmen guilty of seditious libel, and those persons also who espoused the cause of Italian liberty.

Revolutionary activities frequently assume the form of preparations aiming at assassination of the head or the members of the government of a foreign state. The law of England does not countenance this kind of revolutionary action. According to Section 4 of the Offences against the Person Act of 1861 (24 & 25 Vict. c. 100), "all persons who shall conspire, confederate, and agree to murder any person, whether he be a subject of her Majesty or not, and whether he be within the Queen's dominions or not, and whosoever shall solicit, encourage, persuade or endeavour to persuade, or shall propose to any person, to murder any other person, whether he be a subject of her Majesty or not, and whether he be within the Queen's dominions or not," shall be guilty of a misdemeanor and, on conviction, punished by penal servitude. There are instances of prosecution and conviction under this section.[33] The same Act affirmed the well-established statutory rule that a British subject who is an accessory before or after the fact to murder committed abroad may be tried and punished as for the principal offence (Section 9). And it appears, both on principle and according to clear judicial pronouncements, that the term "subject" is here meant to signify persons owing permanent as well as temporary allegiance to the Crown.[34]

The United States of America. The law of the United States is, with regard to the subject under discussion, confined almost exclusively to hostile expeditions. Similarly as in Great Britain, it forms part of the neutrality law; and the expression "Neutrality Act" does not, here also, necessarily imply the existence of a state of belligerency. The Act of 1917 gave the following formulation to the relevant provision of the criminal law of the United States:

> Whoever, within the territory or jurisdiction of the United States or any of its possessions, knowingly begins or sets on foot or provides or prepares a means for or furnishes the money for, or who takes part in, any military or naval expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district or people with whom the United States is at peace, shall be fined not more than $3000 or imprisoned not more than three years or both.[35]

[32] R. *v.* Antonelli and Barberi (1905), 70 J. P. 4.

[33] Reg. *v.* Most (1881), 7 Q. B. D. 244; R. *v.* Antonelli and Barberi (1905), 70 J. P. 4.

[34] Reg. *v.* Sandoval, 3 T. L. R. 411.

[35] Section 8 of the Act of June 15, 1917 (American Journal of International Law, XI (1917), Suppl., p. 186).

The gist of this section was incorporated in the Neutrality Laws of 1794 and 1818, and amended several times in the course of the last century. In applying the law relating to hostile expeditions, American courts have not, on the whole, shown an inclination to extend unduly the restrictions placed upon American citizens.[36] They insist on strict proof that the purpose of the alleged offence was some attack or invasion, *from the territory of the United States*, of another country as a military force. It has been repeatedly held that assistance rendered to expeditions proceeding from other countries is not illegal, and that the existence of an expedition from the United States is a condition precedent to the existence of accessories.[37] This seems to be the main characteristic feature of the obtaining law. However, the presence of this requirement once established, the law is strictly applied to different kinds of participation in criminal offences of this kind.[38] But the courts will refuse to suppress revolutionary activities so long as they are confined to moral agitation,[39] or to interfere with publications criticizing foreign governments or encouraging revolt against them. Neither have the Federal courts the power to punish libels or seditious publications against foreign sovereigns or incitement to assassination of persons residing abroad.[40] But it appears that, at least in some of the States, the courts will take cognizance of conspiracies to commit common crimes abroad.[41]

(*b*) *The System of Mutual Insurance*

In the states which have adopted this system, revolutionary acts of a treasonable character against a foreign government are treated as criminal offences. Here also writers and legislators refer to the necessity of preserv-

[36] The law of the United States is exhaustively treated in the scholarly monographs of Fenwick and Curtis (referred to above), and it is therefore not necessary to discuss it here in detail.

[37] U. S. *v.* O'Sullivan, Fed. Cas. 15975; U. S. *v.* Ybanez, 53 Fed. 536; U. S. *v.* Nunez, 82 Fed. 599; U. S. *v.* Trumbull, 48 Fed. 99, 103; The Itata, 49 Fed. 646. See also H. Ex. Doc. 74, 25th Cong., 2nd Sess., p. 7, and Cushing, Attorney-General in 8 Op. Att. Gen., 216. Neither does the Neutrality Act prohibit the shipping of arms or ammunition to a foreign country or forbid individuals from leaving the United States, singly or in unarmed associations, to join in any military operations: U. S. *v.* Pena (1895), 69 Fed. 983. The laws of the United States make it a penal offence secretly to transport any explosive from the United States to any foreign country (see Moore, Digest, II. § 221). See also the Joint Resolution of the Congress of March 14, 1912, empowering the President to declare unlawful the exportation of arms to any American country where "conditions of domestic violence exist which are prompted by the use of arms and munitions of war procured from the United States."

[38] Some cases which came before the American courts in the course of the Cuban insurrection offer interesting instances of frustrated attempts at defeating by ingenious devices the ends of the neutrality law. See, *e.g.*, the much cited case of *The Horsa* (Wiborg *v.* U. S., 163 U. S. 632, 655).

[39] United States *v.* Lumsden, 1 Bond 5.

[40] Wharton, A Digest of International Law (1886), I, §56, III, §389.

[41] Moore, Digest, II, § 221.

ing the external peace of the state as the main motive underlying the enactments in question, while some appeal to sentiments of international solidarity. However, to judge from the historical antecedents and the individual provisions of the relevant codes, especially from the requirement of reciprocity, this attitude appears to be the product of a policy calculated to ensure the stability of the particular state's own government.

According to Article 102 of the German Penal Code, a German who either at home or abroad, or a foreigner who during his residence in Germany, undertakes an act against a state not belonging to the German Empire which if committed against the German Empire or a Federal State would be punished as treason in the meaning of the code, shall be liable to imprisonment up to ten years. The range of these treasonable acts is certainly a wide one. For according to Articles 81 and 85 of the code, it is not only assassination or attempts at assassination of crowned persons, or attempts to alter by force the constitution of the Empire or of a Federal State that rank as treason, but also direct incitement, by speech or publications, to committing such acts.[42] The operation of these provisions is made contingent upon the fulfilment of three conditions: Firstly, there must be a reciprocal arrangement of the foreign state with Germany; secondly, proceedings only take place at the request of the foreign government; thirdly, the request, which may be withdrawn, must be maintained up to the end of the proceedings.[43] The provisions of the Austrian Penal Code of 1852 are of a similar character.[44] This code is still binding in Austria and, it appears, in some of the new states composed wholly or in part of territories formerly belonging to the Austrian Empire. The Russian Penal Code of 1903 was the most reactionary of all.[45] It threatened with punishment not only all attempts, in Russian territory, to overthrow a foreign government, but also conspiracies and preparations leading up to such attempts, and even participation in organizations working for such objects. And it is not without interest to note that the principle underlying this kind of legislation has now been introduced into the criminal law of Soviet Russia. In a decree promulgated on February 25, 1927, defining offences against the state and anti-revolutionary crimes, such acts are included in the latter designation as are directed against a state of workers even if that state does not belong to the Union of Soviet Socialistic Republics.[46] The provisions of the old Russian code are still binding in several

[42] *Cf.* Liszt, *Lehrbuch des deutschen Strafrechts*, 18th ed. (1911), § 170.

[43] The writer is not aware of any movement in favor of altering this part of the code. It appears that the draft codes of 1919 published by the Federal Ministry of Justice follow closely the wording of Article 102. See *Entwürfe zu einem deutschen Strafgesetzbuch* (1920).

[44] Article 66.

[45] § 135. It was a reproduction of § 260 of the Criminal Code of 1858.

[46] See Ljublinski in *Zeitschrift für Ostrecht*, June 1927, Vol. I, p. 325. On the other hand, Article 21 of the Soviet Constitution of July 10, 1918, and Article 12 of the Soviet Constitution of May 11, 1925, open the doors of Soviet Russia to foreigners prosecuted for political and religious crimes.

states formerly constituting a part of the Russian Empire, especially in Poland.[47]

Some of the South and Central American Republics, much troubled as they were by internal revolutions, approach this type of legislation. Thus the Penal Code of Peru, of 1924, makes it an offence not only to violate the territorial sovereignty of a foreign state by performing there acts of sovereignty and by invading it in violation of international law (§ 297), but also to commit acts calculated to alter by force the political order of other states.

(c) Reference back to International Law

The criminal codes of the countries belonging to this group do not state *expressis verbis* what are the acts which are deemed likely to disturb the external peace of the state and which are accordingly prohibited by law. They content themselves with stigmatizing as crimes such acts as are described as being against international law, or as exposing the country to the danger of war or reprisals, or, in general, as compromising its foreign relations. Whatever may be the propriety of describing certain acts of individuals as "offences against the law of nations," there is no doubt that the municipal law of states belonging to this group views them as such, and that it thus offers a typical example of the adoption, for certain specific purposes, of rules of international law as a part of the law of the land. On the other hand, it seems that this altogether general reference to an extraneous and largely undefined system of law is liable to render very difficult the enforcement of the legal rules in question.

The French Criminal Code may be taken as a good illustration of this group. Articles 84 and 85 of the *Code Penal* provide that a person shall be liable to punishment who by a hostile act not approved by the government has exposed the state to a declaration of war, or the state or a French citizen to reprisals. There is, so far as these two articles are concerned, no case of conviction on record,[48] and only in one case was the prosecution proceeded with. It is a matter of controversy whether these articles relate at all to offences against foreign states, and if they do, whether the expression "hostile acts" applies only to overt acts connected with the organization of military attacks,[49] or to revolutionary propaganda and conspiracies in general. Writers of authority express the opinion that the two articles are without practical application and that they are bound to remain a dead letter.[50]

[47] Makowski, *Kodeks karny, etc.* (1921), II, p. 140. Belgium, yielding in part to foreign pressure, enacted in 1858 a law by which she adopted to a large extent the principles underlying the corresponding provisions of the codes in Germany, Austria and Russia.

[48] For an account of several cases of abortive prosecution *cf.* Appendix 4 to the Report of the Neutrality Law Commissioners, Great Britain, Reports from Commissions, XXXII (1867–1868), p. 45; Garraud, quoted below, Nos. 837 and 839, and Clunet in *Journal*, quoted above, pp. 13, 14.

[49] This appears to be the almost unanimous opinion of French writers. See, for instance, Garraud, *Traité du droit pénal français* (1899), III, § 841.

[50] Garraud, *op. cit.*, § 837; Clunet, *op. cit.*, and Pradier-Fodéré, I, § 238.

This position was clearly illustrated in November, 1926, by the occurrences arising out of an attempted revolutionary expedition of about 400 Spaniards and Italians into Spain. After the French authorities had speedily and efficiently frustrated the plan and arrested about 130 persons, it transpired that they were uncertain as to what charge should be proffered against the arrested filibusters. Of those arrested, about one hundred were subsequently expelled from France, whereas against twenty-six legal proceedings were taken under a law of 1834 which makes it a criminal offence unlawfully to manufacture, possess or distribute arms or munitions of war, and under a law of 1893 which extended that offence to explosives or lethal engines acting by explosion.[51] Very critical also are the Italian writers in their comments upon their own code.[52] It provides, in Article 113, that any person shall be liable to punishment who by enlistment or other hostile acts unauthorized by the government exposes the state to the danger of war or reprisals, or, in general, who disturbs the friendly relations between the Italian Government and a foreign state. The Spanish Criminal Code punishes such acts as compromise the external peace of the state or as violate the law of nations.[53] The provisions of the Norwegian and Swiss Criminal Codes are of a similar character.[54]

INTERNATIONAL CONVENTIONS

A survey of conventional international law bearing upon the subject shows that treaties providing for an extensive measure of protection, a measure wider than that which is put forward in this article as the accepted standard of international obligation, are few and of an altogether exceptional character. They are mainly conventions concluded by revolutionary governments or governments of countries suffering chronically from revolutionary commotions, both seeking, for an adequate *quid pro quo*, to attain additional security from revolutionary designs coming from abroad.

The treaties concluded by the revolutionary British Government under Cromwell offer an early illustration of this type of compact. In the treaty of April 11, 1654, between Great Britain and Sweden, the contracting parties bound themselves to "take care of, and promote the welfare of each other; and . . . advertise each other, upon knowledge thereof, of all imminent dangers, plots and conspiracies of enemies against the other; and, as much as in them lies, oppose and hinder the same."[55] Similar obligations were as-

[51] London *Times*, November 15, 1926.

[52] *Cf.* Manzini, *Trattato di diritto penale italiano* (1911), IV, Nos. 1014 *et seq.*, where the matter is treated exhaustively and with great learning.

[53] §§ 148, 153, 154.

[54] Articles 85 and 41 respectively. As to the Swiss legislation and practice see Stooss, *Die Grundzüge des schweizerischen Strafrechts* (1893), II, §125, who criticizes the vagueness of Art. 41; Fleiner, *Schweizerisches Bundesstaatsrecht* (1923), p. 748, and Salis, *Schweizerisches Bundesrecht*, 2nd ed. (1903), IV, Nos. 2044–2066 (revolutionary propaganda against foreign states) and Nos. 2048, 2050, 2066, 2075, 2078 (approval of assassination).

[55] Article II; Hertslet, Treaties, II, p. 310.

sumed at that period in the treaties of Great Britain with Denmark,[55] Portugal,[57] and Spain.[58]

Victorious Napoleonic France was anxious to insert in her treaties detailed provisions intended to protect her from conspiracies on the part of her royalist subjects abroad. Thus the Treaty of Paris, of October 8, 1801, between France and Russia provided in Article III:

> The two Contracting Parties . . . engage not to suffer their respective subjects to maintain any correspondence, direct or indirect, with the enemies of the present government of the two States, or to propagate principles contrary to their respective constitutions, or to foment disturbances, and that in consequence of this Agreement, every subject of one of those Powers inhabiting the states of the other, who shall do anything to its safety, shall be removed from the said country and transported beyond its frontiers without having any claim to the protection of its own government.[59]

In the course of the nineteenth and twentieth centuries, the South and Central American States, suffering acutely on account of frequent revolutions, enriched conventional international law on this subject by numerous treaties calculated to prevent the territories of neighboring states from becoming a basis for hostile expeditions or hostile attempts in general.[60]

After the World War, Soviet Russia, presenting in this respect a close analogy to revolutionary France, concluded a series of treaties with a view to curbing the revolutionary activities of the opponents of the Soviet Government residing abroad, as well as to affording to the other contracting party some assurance as to the revolutionary propaganda emanating from the territory of Soviet Russia. Thus Article VII of the peace treaty of February 2, 1920, between Soviet Russia and Esthonia provides that both parties undertake "to prohibit the creation and presence in their territories of organizations and groups which claim to be the government of the territory, or a part of the territory of the other contracting party, or of representations and officials of such groups and organizations as aim at the overthrow of the government of the other contracting party."[61] Similar provisions are

[55] Article V of the treaty of February 13, 1660; *ibid.*, I, p. 179.

[57] Article I of the treaty of July 10, 1654; *ibid.*, II, p. 9.

[58] Article II of the treaty of May 13, 1667; *ibid.*, II, p. 140.

[59] Article I, Martens, *R.* 7, p. 386.

[60] See the treaty between Peru and Ecuador of March 16, 1853, and between Peru and Bolivia of April 19, 1840 (both referred to by Pradier-Fodéré, I, §238). More recent treaties are, however, less exacting. The duties of the contracting parties are here confined to prevention of hostile expeditions proper and recruitments. See, *e.g.*, the treaty between Bolivia, Colombia, Ecuador, Peru and Venezuela of July 18, 1911, in *Revue générale de droit international public*, XIX (1912), p. 345. The considerations of mutual insurance which frequently underlie these treaties are well expressed in Article XVI of the General Treaty of Peace and Amity of December 20, 1907, concluded between the five Central American Republics (American Journal of International Law, II (1908), Suppl. p. 226).

[61] The treaty is printed in *Russlands Friedens- und Handelsverträge*, ed. by Freund (1924), p. 49.

contained in the treaties concluded by Soviet Russia with Latvia,[62] Mongolia,[63] Persia,[64] Turkey,[65] and Japan.[66] But it appears that the Soviets are not prepared to enter into such engagements with other Powers.[67]

It is believed that the treaties to which attention has been drawn in this section are entirely outside the circle of those contractual relations which are the outcome of normal intercourse between nations. They tend to confirm the proposition that there is nothing, so far as conventional international law is concerned, to warrant the assertion that states have assumed the obligation to protect their neighbors from every conceivable kind of revolutionary design directed against them.

INTERNATIONAL INCIDENTS

While the obligation of the state to prevent its territory from becoming a base for organized armed insurrection against foreign countries has never been seriously challenged, the claim to protection from revolutionary propaganda and conspiracies in general has been constantly repudiated by states whose constitutional principles did not allow an excessive measure of compliance with the requirements of the safety of foreign governments, and which were at the same time in a position to resist political pressure from abroad. Reasons of space permit to mention here only a few instances illustrating this proposition. They are taken from the history of the three states which came into closer grips with this problem, *i.e.*, of Great Britain, the United States and Switzerland.

Great Britain. To judge from the bulk of the correspondence which preceded the British and French declarations of war in 1803, the complaints of France on account of the activities of the French royalists in England were one of the principal reasons which contributed to the estrangement of relations between the two governments.[68] France complained that royalist refugees caused seditious publications to be distributed in that country, and that French bishops counteracted, from the safe soil of England, the ecclesi-

[62] Article IV (2) of the treaty of August 11, 1920, *ibid.*, p. 99.

[63] Article III of the treaty of November 5, 1921, *ibid.*, p. 130.

[64] Article IV of the treaty of February 25, 1921, *ibid.*, p. 144.

[65] Article VIII of the treaty of March 16, 1921, *ibid.*, p. 190.

[66] Article V of the treaty of January 20, 1925, Martens, *N. R. G.*, 3rd ser. XV, p. 324.

[67] When, at the International Economic Conference at Genoa in 1922, Russia was asked to suppress the attempts to assist revolutionary movements in other countries, the Russian delegation replied that the Soviets are not willing to curb the activities of political parties and workers. *Cf.* 1922 (Cmd. 1667). Similar treaties concluded by Soviet Russia with other states,—*e.g.*, the Preliminary Treaty of Peace between Poland and Russia of October, 1920 (League of Nations Treaty Series, IV, p. 35), or the unratified General Treaty between Great Britain and Russia signed at London, August 8, 1924 (1924) Cmd. 2260,—relate to subversive activities originating from the government itself, from its organs, or persons and organizations assisted and subsidized by it. They are outside the scope of the present article.

[68] *Cf.* the official *Moniteur* of August 9, 1802.

astical reforms introduced by the Emperor. Indignation was even expressed at the royalists being allowed openly to wear French orders which no longer existed.[69] As to the attacks on the French Government in the press and in political pamphlets, it was maintained that, although the liberty of the press with regard to internal affairs may be unlimited, it is the duty of the government to punish and to repress such publications as cause injury to the interests and to the honor of foreign states. Throughout the controversy, the British Government refused to admit that the law of nations countenances demands of this kind. It was emphatic in pointing out that, being itself frequently exposed to abuse in prints which it had neither the power nor the desire to punish, it was not willing to depart from this policy in deference to the interests or wishes of a foreign Power.[70] As to the suggestion that the recently passed Alien Acts gave to it the power to expel aliens at discretion, the characteristic reply was that the Act was passed for the protection of Great Britain, and not for that of other countries.

Even more instructive is the correspondence which took place in 1852 between the British Government, on one side, and Austria, France, Prussia, Russia, the German Confederation and the Kingdom of the Two Sicilies, on the other. The Continental Powers demanded that Great Britian should repress the revolutionary activities of the numerous bodies of foreign political refugees organized in this country. This the British Government consistently refused to do unless it could be shown that these activities amounted to the common law offence of levying war against a friendly Power, *i.e.*, to organizing a hostile expedition. The complaining Powers urged that there are other undertakings against the security of foreign states than levying war against them. They illustrated this by pointing to the fact that Italian refugees issued in London a loan the produce of which was destined to purchase arms and munitions with the avowed purpose of fomenting civil war in Italy; that proclamations have been issued in London calling the Continental peoples to arms; and that the refugees attempted to spread among the armies of the Powers seditious writings with the view to shaking the allegiance of troops.[71] The British Government, however, did not recede from the position originally adopted, and the British note which concluded the correspondence contained an affirmation, wrapped in language of sympathetic understanding, of the original British attitude. It undertook to discourage and to repress the revolutionary activities so far as law and constitution warrant.[72] A year later Lord Palmerston gave expression, in a

[69] Dispatch of Mr. Merry to Lord Hawkesbury, June 4, 1802, Annual Register (1803), p. 656, and note of M. Otto to Lord Hawkesbury, June 25, 1802, *ibid.*, p. 660.

[70] Lord Hawkesbury to Mr. Merry, June 17, 1802, *ibid.*, p. 658; the same to M. Otto, August 17, 1802, *ibid.*, p. 661, and on August 28, 1802, *ibid.*, p. 664.

[71] Correspondence between Great Britain, France etc., respecting Foreign Refugees in London (1851, 1852), British and Foreign State Papers, XLII, pp. 401–405, 430 *et seq.*

[72] The Earl of Malmesbury to Count Buol, *ibid.*, p. 439.

form even less ambiguous, to the sentiments of the British Government on the matter: "The British Government has never undertaken to provide for the internal security of other countries; it is sufficient for them to have the power to provide for the internal security of their own."[73] The consistency with which this attitude was maintained by Great Britain is the more instructive as a different practice would have enabled successive British Governments to press with more vigor their complaints with the United States on account of the Irish and Fenian activities conducted from that country. It seems that Great Britain, in her correspondence with the United States, was prepared to admit that so far as hostile propaganda and revolutionary activities falling short of preparations for a hostile expedition are concerned, a state is not bound to accede to requests the fulfilment of which is incompatible with its laws and constitution.[74]

The United States. The practice of the United States resembles that of Great Britain. In answering complaints, the Department of State refers as a rule to the municipal law of the United States which does not punish revolutionary proceedings until they have reached their natural consummation, namely, interference or overt attempts at interference in the affairs of other countries by organized acts of force. The British inquiry in 1885 as to the legality in the United States of participating in the Irish National League, an organization to promote insurrection in Ireland, was answered to the effect that the United States punished treason only against its own country, but not against other countries.[75] A similar answer was made to the complaints of Spain in the same year: "It (the United States) does not

[73] In the House of Commons on March 1, 1853 (Hansard, Parliamentary Debates, 3rd ser., Vol. 124, p. 815). The opinion may be ventured that the statement of the law on the subject as laid down a few days later by Lord Lyndhurst, supported by Lord Brougham and Lord Truro, and defining in very wide terms the duty of private persons to refrain from revolutionary attempts against foreign States (*ibid.*, p. 1046) was made with the view to influencing the political refugees and strengthening the hands of the government, and that its contents and spirit find no confirmation either in the judicial or political practice of Great Britain.

[74] See Lord Palmerston's note of September 30, 1848 (Ex. Doc. No. 19. House of Repr., 30th Cong., 2nd sess., Vol. 4, p. 21). As to the activities in London after 1848 of the sundry revolutionary bodies, like the Committee of Central European Democracy, the Central Democratic European Committee, the Central National Italian Committee, and the Central Committee of Italian Refugees, see memorandum to the note of Count Walewski, of October, 1851, House of Commons, Bills and Papers (1852) LIV, pp. 49 *et seq.* There should also be noted the attempted expeditions in 1846 and 1847 against Ecuador and Portugal respectively (see Report of the Neutrality Law Commissioners, Appendix No. 3, p. 38, Reports from Commissions (1867–1868), XXXII, p. 24); the frustrated expeditions against Spain from England and Gibraltar in 1830 (British and Foreign State Papers, XXIV, pp. 812 *et seq.*); the much quoted Terceira affair in 1827 (the entire correspondence is reprinted in the Annual Register (1829), 435–471); the Carlist activities in 1874 (see Hansard, Parl. Deb., ser. III, Vol. 215, p. 634; and the preparations of the Portuguese royalists in 1911 (Fauchille, I, Part 1, No. 295).

[75] Secretary Bayard to the British representative, April 2, 1885, Moore, Digest, Vol. II, §221.

assume to visit with penalty conduct, which if committed within a foreign jurisdiction, might be punished therein."[76]

Switzerland. The practice of Switzerland is different from that of the United States and Great Britain. There is here no departure from the principle of granting asylum to political offenders, but hospitality is afforded subject to the condition that the alien refugee will abstain from such revolutionary activities as may compromise the international relations of Switzerland. Thus we find the Swiss Federal authorities expelling in 1879 a German journalist for having published in a Socialist paper an article reproaching the German Socialists on account of their inactivity and exhorting them to more energetic propaganda.[77] The same fate, for a similar offence, befell in 1888 four editors of the organ of the German Socialistic party published in Switzerland.[78] These are only two instances of the regular practice followed by Swiss judicial and administrative authorities.[79] The final

[76] Secretary Bayard to Mr. Valera, July 31, 1885; For. Rel., 1885, p. 776. See also President Cleveland's fourth Annual Message to the Congress referring to the Spanish demands arising out of the revolutionary activities of the supporters of the Cuban insurrection: "Many Cubans reside in this country and indirectly promote the insurrection through the press, by public meetings, by the purchase and shipment of arms, by the raising of funds, and by other means which the spirit of our institutions and the tenor of our laws do not permit to be made the subject of criminal prosecution" (Richardson, Messages, IX, p. 718).

Valuable references, especially with regard to cases which came before the courts of the United States, will be found in the monographs of Fenwick and Curtis referred to above. Apart from this, the following references to some of the incidents which gave rise to diplomatic correspondence may be found useful: Thus the United States were involved in 1835 in diplomatic correspondence with Mexico in consequence of the support given by American citizens to revolutionaries in Texas (H. Ex. Doc. 74, 25th Cong., 2nd Sess.); with Great Britain in connection with the Canadian rebellion in 1837 and the activities of Fenian societies and Irish insurgents: Curtis, *op. cit.*, pp. 25, 242; For. Rel., 1865–6, I, 572; *ibid.*, II, pp. 96, 103; *ibid.*, 1866–7, I, pp. 25, 69–97; Moore, Digest, II, §221; with Spain in consequence of the hostile expeditions to Cuba from 1849 to 1851, in 1868, in 1873 and from 1884 up to the Spanish-American War: Fenwick, *op. cit.*, p. 45; H. Ex. Doc. No. 160, 41st Cong., 2nd Sess., p. 133; For. Rel., 1871, pp. 778–791; *ibid.*, 1874, pp. 117, *et seq.*; *ibid.*, 1875, pp. 1158–1256; *ibid.*, 1884, pp. 493–521; *ibid.*, 1885, pp. 767–773; *ibid.*, 1887, pp. 1026, 1029, 1471–1473; Olivart, *op. cit.*; with Nicaragua in 1885: Moore, Digest, VII, §1300; with Honduras and Nicaragua in 1866: For. Rel., 1868, II, pp. 536–545; again with Mexico in 1868, 1872, 1877, 1878, 1893 and 1912: For. Rel., 1868–9, II, pp. 534, 574, 633–639; *ibid.*, 1877, p. 405; *ibid.*, 1878, pp. 674–684; *ibid.*, 1893, pp. 425–435, 440–448; as to the insurrection in 1912, see Fenwick, *op. cit.*, pp. 56–58 and, in particular, For. Rel., 1912, pp. 240–242; with Colombia in 1885: For. Rel., 1885, pp. 23;–275; with Haiti in 1888 and 1889: *ibid.*, 1888, pp. 988–990; with Chile in 1891: *ibid.*, 1891, pp. 314–317; with Venezuela in 1892: *ibid.*, 1892, pp. 624–634, 645–648; and with Honduras in 1885 and 1889: *ibid.*, 1885, pp. 138–143 and 1899, pp. 364–370.

[77] The Gehlsen case, Salis, *op. cit.*, IV, No. 2049.

[78] *Ibid.*, No. 2064.

[79] For numerous cases from 1874 upwards, see Salis, *op. cit.*, Nos. 2035–2088. For details as to diplomatic incidents arising out of revolutionary activities against France at the end of the eighteenth and at the beginning of the nineteenth century, see Danliker, *Geschichte der Schweiz*, III, pp, 517–519, 585–587; for later instances up to 1870 see *Gastfreundschaft und Hausrecht der Schweiz* (1881), pp. 25, 26, 44–47, 57, 58. As to the activities, after the

adoption of this policy was brought about mainly by two factors. The first is that, apart from the vague provision of Article 41 of the Penal Code, Switzerland possesses no laws dealing with hostile expeditions proper, and that the penalty of expulsion was applied alike to all kinds of hostile action, from a hostile expedition *stricto sensu* to the publication of a relatively innocuous pamphlet. The unusually lenient treatment of the former offence was balanced by harsh interference with mere expression of opinion and propaganda. The second factor was that Switzerland, politically and economically dependent upon her neighbors, was frequently driven by external pressure to measures foreign to the spirit of her institutions. What, however, was originally acquiesced in only with considerable reluctance, has at the end of the nineteenth century developed with many Swiss writers into an *opinio necessitatis.*[80] While disclaiming any intention of relinquishing the much cherished right of granting asylum to foreign political offenders, Swiss statesmen and publicists exhibit a marked apprehension, justified, no doubt, by the experiences of the past, lest the hospitality granted to foreigners be abused in a manner likely to embroil Switzerland with other Powers. However, beyond general statements of this kind, there is no attempt to define the exact measure of the international obligations of Switzerland in this respect. Much stress is laid on the necessity of avoiding friction with foreign Powers; the question is not gone into what kind of hostile acts may in law give cause for complaint.

It was only after prolonged resistance that Switzerland, yielding in 1823 to the pressure of Austria and of the Powers forming the Holy Alliance, enacted the first alien decree in which the Cantons were instructed to expel such refugees as abuse the right of asylum by engaging in machinations against the legitimate governments of friendly states. The decree was repealed in 1829, but again introduced in 1836 as a result of the concerted action of Sardinia, Austria, France and the South German States on account of manifest preparations for the invasion of the territory of the latter, as well as of an unsuccessful raid of several hundred refugees into Savoy. Switzerland, acting under the threat of reprisals, had to comply with the demand of these Powers to the effect that not only actual accomplices should be expelled, but also all persons likely to disturb in the future their security or tranquillity.[81] In these alien decrees lies the origin of that elastic pro-

Congress at Vienna, of the democratic societies of "Young Europe," "Young Germany," "Young Austria," and the like, see *Die geheimen deutschen Verbindungen in der Schweiz seit 1823*, Basle (1823).

[80] See *Gastfreundschaft, etc., passim;* Fleiner, *op. cit.*, p. 49; Salis, *op. cit.*, No. 2040.

[81] The entire correspondence in this matter between Switzerland and the Continental Powers is printed in British and Foreign State Papers, XXIV (1835–1836), pp. 979–1063, where instructive references will be found on what the Powers believed to be the rule of international law on the subject. "Le Directoire Fédéral doit sentir que le premier des devoirs d'un Etat envers ses voisins est de ne pas devenir pour eux un objet d'inquiétude," —thus wrote Count Metternich in 1834.

vision of the Federal Constitution which threatens with expulsion aliens who endanger the external security of Switzerland. The Powers did not fail to take advantage of the latitude of this provision. France and Austria demanded in 1853 that Switzerland should undertake to expel such refugees as the diplomatic representatives of these countries may designate. Austria backed her demand by closing her Swiss frontier and by recalling her envoy. Although the Federation refused this particular request, it had to give assurances which again had the effect of extending the scope of its obligations.[82] No attempts were afterwards made to frame more detailed laws relating to hostile expeditions, and when in 1898 armed revolutionary groups of Italian subjects tried to invade from Switzerland the northern provinces of their country, 249 of these insurgents were actually arrested and handed over to Italian troops guarding the frontier.[83]

CONCLUSIONS

The examination of the internal and international practice of states has shown that there is no common measure of agreement on the question as to the scope of state responsibility for preventing and repressing revolutionary acts of private persons against foreign states. What, then, is there, in default of a concordant practice, to guide our steps in extracting a working rule? It is the consideration that, there being no agreement on all the aspects of the problem, the rule of international law must necessarily be deduced from such minimum of concordant opinion and practice as exists on the matter. This rule could be formulated as follows:

International law imposes upon the state the duty of restraining persons resident within its territory from engaging in such revolutionary activities against friendly states as amount to organized acts of force in the form of hostile expeditions against the territory of those states. It also obliges the state to repress and to discourage activities in which attempts against the life of political opponents are regarded as a proper means of revolutionary action.

Apart from this, states are not bound to prohibit, on their territory, the commission of acts injurious to other states. In particular, revolutionary propaganda does not fall within the scope of revolutionary acts which a state is bound to prevent. The circumstance that even such states as prohibit in their penal codes *all* kinds of treasonable practice against foreign Powers do so subject to reciprocal arrangements with those Powers, is sufficient to show that the enactment of these penal provisions is not regarded as directly following from a precept of international law. States

[82] *Gastfreundschaft, etc.*, pp. 57–65.

[83] The Federal Assembly expressed its disapproval of the action of the Federal Council at whose instance this measure was taken. See Hilty in *Politisches Jahrbuch*, XII (1898), pp. 346 *et seq.*; Kebedgy in *Revue générale de droit international public*, V (1898), pp. 480–492; Salis, *op. cit.*, No. 2082.

do not make the fulfilment of fundamental international obligations contingent upon express assurances of reciprocity.

The nearest approach to what is believed to be the true juridical construction of the state's duty to prevent organized hostile expeditions from proceeding in times of peace against a friendly state will be found in the law of neutrality. The law of neutrality, while enjoining upon the state itself absolute impartiality and abstention from assisting either belligerent, does not impose upon it the duty of securing an identical line of conduct on the part of its subjects. They may assist individually one or both belligerents in a variety of ways, as, for instance, by enlisting in their armies, by selling ships, munitions and provisions, by managing for them factories and depots, by transporting their goods and munitions, by supplying them with loans, etc. There is, however, one important exception to the liberty which the state may accord to its citizens: It must prevent them from committing such acts as would result in the neutral territory becoming directly a base for the military operations of either party. They must not build or fit out ships to the order of belligerents; they must not supply the belligerents' war vessels with coal and provisions in such a manner as to make the neutral ports a naval base of that belligerent; they must not leave the neutral territory in organized military units. In these two features of the law of neutrality—the distinction between the duties of states and those of their subjects, and the exclusion of neutral territory as a base for military or naval operations against a friendly state—lies also the main characteristic of the duty of states with regard to hostile expeditions in time of peace. This duty is not a consequence of the other state's right of independence which cannot, logically, in any way be interfered with or impaired by acts of individuals. It is the result of the well-established customary rule that the territory of a state must not be allowed to serve as a base for military or naval operations against another state. The two situations being closely analogous, it is only natural that they are regulated in Great Britain and in the United States in the same legal enactments. The law of hostile expeditions is nothing else than the law of neutrality in relation to an actual or impending civil war.

With regard to preparations and conspiracies to murder, it is believed that a state is fully entitled to claim from other members of the international community a reasonable measure of protection from this particular kind of revolutionary activity. In fact, most municipal systems of criminal law provide for punishment of conspiracies to assassinate persons abroad, or of incitement to assassination, or of participation in murders committed abroad. No unreasonable burden of specially protecting the life of foreigners abroad is thereby imposed upon a state. Its sole duty is to give to foreigners abroad, without distinction of person, the same security from assassination, not a greater or a special one, which it affords to those resident within its territory. This is a duty imposed by considerations higher than

international solidarity. For assassination is, in international law, a crime even as between regular belligerents.

It will, of course, be observed that the rule that the state is responsible for such revolutionary acts of private individuals as it is bound to prevent is terminologically not quite exact. For the state is responsible for its own acts or omissions. It is originally responsible for having culpably omitted to prevent certain acts on the part of private persons. And it is vicariously responsible when, notwithstanding due diligence having been exercised by its authorities—for culpability is here as elsewhere a *conditio sine qua non* of liability, injurious acts have been perpetrated and the duty of the state is reduced to apprehending and meting out punishment to guilty individuals. But hostile acts having been committed, it is for the state to establish that no guilt can be attributed to it. Especially, it will not escape liability if its government has failed to cause such laws to be enacted as would enable the administrative and judicial authorities effectively to prevent or repress the criminal act. International law is not concerned with the manner in which states elect to meet this particular duty of theirs. Great Britain and the United States may do it by means of well-defined rules relating to hostile expeditions; Germany may meet this particular obligation with the help of the very comprehensive provision punishing treasonable acts against foreign states; France may perform that duty by relying on her laws against unlawfully possessing and distributing arms and explosives. So long as these laws are reasonably sufficient to prevent hostile acts or to punish them after they have occurred, the state has performed its duty. But should it visit such offences by small fines, or, with regard to foreigners, by expulsion only, or should its laws be of such a nature that, notwithstanding their theoretical comprehensiveness, they are in fact incapable of enforcement, then again it will find it difficult to escape liability for hostile acts rendered more probable as a result of the leniency or technical shortcomings of its laws.

Apart from the two kinds of revolutionary action referred to above, international law imposes no further obligations. All other forms of revolutionary activity cannot, if coming solely from private individuals, furnish a legitimate cause of complaint. This being the state of the law, it may now be asked whether it is a satisfactory one. It is pointed out on the part of the advocates of a more vigorous protection of foreign governments and constitutions that the unity of law and the growing solidarity between the members of the international community necessarily imply such a course. To this the answer must be that the international community is not, to use Westlake's expression, one of mutual insurance for the maintenance of established governments. Treason is not an international crime. An active enemy of his government is not an enemy of mankind. The principle of legitimacy introduced by the Holy Alliance is not part of modern international law, although it may have survived to a certain extent in one or two penal codes, and although some American republics may have recently

found it necessary to revive it, to a limited extent, in a series of conventions and declarations based on the so-called Tabor doctrine. Neither does international law treat as outlaws individuals who, in a civil war, rise in arms against their government. It grants them, under certain conditions, the status of belligerency and, according to the better opinion, stamps as unlawful intervention in aid of the established government. International law flowing from international solidarity cannot mean that a state is bound to prevent anything which constitutes a danger to foreign states. Not every injury done to the interests of a foreign country constitutes a breach of international law. As between individuals, there must be not only *damnum*, but also *injuria*. A state must not be forced into the impossible position, dangerously approaching intervention, of a guardian of other states' constitutions and tranquillity. Foreign governments themselves should secure this end, either by adequately enforcing their own laws or else by creating reasonable conditions for their firm establishment. A state cannot be saddled with the duty of actively protecting, to an extent in excess of the irreducible minimum, a constitution or a régime which may be either distasteful to the overwhelming majority of its own citizens, or a matter of complete indifference to them. The constitution is the first and highest law for the country in which it is in force, and it lies in the nature of things that acts and attempts calculated to overthrow it by unlawful means are visited by severe punishment. But it would be difficult to adduce reasons of equity or of law in favor of the contention that a country is bound to ensure the continued existence of governments and constitutions, frequently ephemeral, other than its own. In the course of eighty years France changed seven times her form of government, but there was nothing, except her own laws which successive régimes were enforcing at different times, to suggest that any particular form of government in France was an interest protected by international law. What international law protects is the right of the state to possess, free from interference on the part of other states, such constitution or government as its citizens choose or tolerate. The duty of respect which a state owes, in international law, to the constitution and government of another country is a negative one, a *non facere;* it is not a duty of active protection. If there were such a duty, many states might frequently become exposed to international complications in consequence of the impossibility of securing a conviction by their juries and other judicial organs. It is better that the scope of this kind of law should be a limited one, than that its comprehensiveness should eventually give rise to complaints and remonstrances. Undoubtedly, a state may go beyond its international obligations and, in its own interest, put a check upon such revolutionary activities as it is not in international law bound to prevent. Many states may not, from a variety of reasons, be disposed to tolerate within their borders revolutionary propaganda, even if not directed against their own government. But such repressive measures, dictated as

they may be by reasons of international comity or internal police, cannot be invoked as constituting a test of international obligation.

It is believed that a systematic treatment, with the view to formulating clear rules of international law on the subject of this branch of the doctrine of state responsibility, may do much to remove the question from the realm of politics and purely momentary considerations. Above all, it would supply the much needed test for municipal legislation and administration of justice, which will thus be relieved of the necessity of relying upon the vague, much abused and ever-changing conception of preservation of peace, a remnant of a rudimentary stage of international law. It is for international law to lay down clear principles as to what acts and omissions will, in strict law, endanger a country's peace. No doubt, the measure of protection thus defined will be a modest one, but it will be all that healthy and progressive states are likely to concede or apt to demand. By eliminating exaggerated and never conceded claims of protection, the rule thus formulated is bound to bring into relief those obligations grounded in the responsibility for revolutionary acts of private persons which no civilized state may disregard with impunity. On the other hand, the very limitation of the scope of state responsibility for revolutionary acts of private persons will accentuate its undoubted and unlimited responsibility for such revolutionary propaganda and other acts of a revolutionary character as originate from its own government or from persons or institutions in receipt of governmental subsidy or assistance.

EDITORIAL COMMENT

PROGRESS IN CODIFICATION AT GENEVA

Due to the delay, no doubt unavoidable, in the printing and distribution of the complete record of the proceedings, debates, and reports of the Eighth Assembly of the League of Nations, it is impossible at this time to present a full review of the steps taken at the Assembly looking toward the codification of international law. Until almost the close of its sessions it appeared that little progress would be made. The Assembly received the report of the Council and provided for the appointment by the Council of a new committee of five to prepare bases for discussion to be presented to a proposed full conference upon codification which had been recommended to the Council by M. Zaleski. The Budget Committee, however, reported to the Assembly an item for the work of the new committee only for the ensuing year, thus depriving the old committee of all support until the following year. Sweden, which had taken the initiative and given the effective impetus to the work of codification in the Assembly of 1924, opposed this item of the budget and, aided by the delegates from Latin America, succeeded in amending the budgetary item. The new committee of five is to be appointed by the Council [1] and will, notwithstanding the amended budget item, apparently supersede the full committee of sixteen. Appointed as it is to be, it will not be officially representative of states, League members, or otherwise. In this respect it resembles the first committee, which is instructed "at its next session to *complete* the work it has already begun," thus providing for the committee's discontinuance.

In addition to the provision for a new committee, the Assembly, again following the recommendation of M. Zaleski to the Council of June last, pronounced in favor of a full international conference on codification to be held probably in 1929 and preferably at The Hague. It would seem, however, that although the formal invitations may be issued by the Government of the Netherlands (which had already expressed its willingness and desire to have such a conference held at The Hague), that government will not determine the agenda, for they have been accepted as the result of the first committee's work, *i.e.*, the consideration of the subjects of nationality, territorial waters, and responsibility of states for damage done in their territory to the person or property of foreigners. The new committee, thus to be appointed

[1] On Sept. 28th the Council authorized its Acting President, in consultation with the Secretary General, to appoint the members of the committee. As a result of this decision, the Acting President, after submitting a list of the proposed nominations to his colleagues on the Council, appointed the following persons to serve on this committee: Professor Basdevant (France), M. Carlos Castro Ruiz (Chile), Professor François (Netherlands), Sir Cecil Hurst (Great Britain), M. Massimo Pilotti (Italy). Note by the Secretary General in Publication of the League of Nations, V. Legal. 1927. V. 28.

by the Council, seems to be charged with the preparation for and conduct of the conference.

Two suggestions made in the Assembly's resolution are very important: one, the possibility of reaching agreements by the conference through majority votes; and two, the adoption of a conception of codification extending beyond that of restating existing rules of law, namely, that the conference "should aim at adapting them as far as possible to contemporary conditions of international life." At first sight and theoretically it would seem as if this would be a more difficult problem than the older and more restricted one. Practically, however, and now, it may be easier of successful accomplishment.

In order that this work of codification should not have too European a flavor, the Assembly stipulated that the new committee should take into account "the extensive and remarkable effort at codification, made by the Pan American Union," which is the basis of the Rio projects to be presented to the Sixth Pan American Conference at Havana. Realizing the importance of coördinating the codification work of both continents, the delegation of Paraguay proposed "a general and comprehensive plan of codification." The Assembly expressed its appreciation of the importance "which attaches to the spirit underlying the proposal of the delegation of Paraguay," and referred it to the first (or old) committee for examination and report. The text of the full Paraguayan proposal is not yet available.[2] The results of the Assembly of 1927 as to codification may be taken as a justification of that portion of the closing address of its president, Señor Guani of Uruguay, in which he said: "In the sphere of international law the peoples beyond the seas are making a most valuable contribution and it is at their insistence that you have decided to continue work in this direction."

JESSE S. REEVES.

ARBITRATION AND OUTLAWRY OF WAR AT THE EIGHTH ASSEMBLY OF THE LEAGUE OF NATIONS

At the Eighth Assembly of the League of Nations, held from September 5 to 27, 1927, the cause of peaceable settlement of international differences and the "outlawry" of wars of aggression made substantial progress. While disarmament was at the outset the central theme of discussion, as soon as the general debate got under way, the discussion shifted to arbitration and other devices for the maintenance of the general peace. The Dutch delegation proposed a re-discussion of the Geneva Protocol of 1924; Poland proposed a declaration outlawing aggressive war; and Norway suggested a convention supplementary to Article 36 (the optional clause) of the Statute of the Permanent Court, for the obligatory arbitration of non-legal disputes.

[2] It has since appeared and is printed in the Special Supplement to this JOURNAL, pp. 231 and 345.—ED.

The Polish proposal was unanimously adopted upon a roll call. It reads as follows:

> The Assembly,
> Recognising the solidarity which unites the community of nations;
> Being inspired by a firm desire for the maintenance of general peace;
> Being convinced that a war of aggression can never serve as a means of settling international disputes and is, in consequence, an international crime;
> Considering that a solemn renunciation of all wars of aggression would tend to create an atmosphere of general confidence calculated to facilitate the progress of the work undertaken with a view to disarmament;
> Declares:
> (1) That all wars of aggression are, and shall always be, prohibited.
> (2) That every pacific means must be employed to settle disputes, of every description, which may arise between States;
> The Assembly declares that the States members of the League are under an obligation to conform to these principles.

This declaration was nothing more than a resolution of the Assembly. It does not of course bind the governments whose representatives voted for it. It is similar to the declarations in the Hague Conventions of 1899 and 1907 (Arts. 16, 38 respectively) to the effect that in questions of a legal nature, and especially in the interpretation or application of international conventions, arbitration is recognized by the contracting Powers as the most effective and most equitable means of settling disputes where diplomacy has failed; and to the declaration in the preamble of the latter convention approving the principle of compulsory arbitration. Such affirmations have no value further than their moral effect as solemn expressions of the opinions of the body which make them.

In the case of the resolution of the Eighth Assembly quoted above the moral effect is not inconsiderable. It was unanimously adopted by an assembly representing 49 States—all the members of the League of Nations in fact, except six—an assembly in which about half of the States present were represented by statesmen immediately responsible for the conduct of the foreign affairs of their respective countries. It was the first time that an assembly composed of so many responsible and eminent statesmen and representing so large a number of the governments of the world solemnly recorded its conviction that wars of aggression shall cease, and that international differences of every character must be settled by peaceable means. If, as Mr. Root once said, progress consists not alone in the distance actually travelled but also in the achievement of getting started right, it may be safely affirmed that this pronouncement represents a notable step in advance. Having reached a conviction on the general principle enunciated in the declaration, it was easy to affirm it in the form of a *voeu*.

But, unfortunately, declarations of this kind are not self-executing. They must be followed by conventions and the establishment of machinery, and these in turn necessitate further agreements before the declaration can be put

into effect. Wars of aggression cannot be outlawed by mere resolutions of assemblies any more than burglary in the community can be. Mobilization of public sentiment against them is a necessary preliminary step in the process, but agencies and institutions through which the force of public opinion can be given effect are equally necessary. Unfortunately, when it comes to devising and creating these, difficulties will be encountered and differences of opinion will arise which do not present themselves when it is merely a question of affirming a general principle, just as they arose at The Hague in 1907 when the conference, having unanimously agreed upon the establishment of a court of arbitral justice, it undertook the task of giving effect to its decision by creating an institution to accomplish the object sought.

The fate of the Geneva Protocol of 1924 furnishes a more recent illustration of the difficulty of reaching the agreements which are necessary before resolutions of the Assembly of the League can be carried into effect. The Protocol was formulated and adopted by the Assembly with practical unanimity, but it never went into effect because it failed to obtain the approval of the governments whose representatives formulated and signed it. Without this approval the declaration of the Assembly of 1927 must remain simply as a "pious wish." We have no assurance that the governments whose representatives adopted it with such remarkable spontaneity and unanimity will ever ratify it, or if they do, that they will ever agree upon the necessary measures to put it into practical operation. This, only the future can determine. We can only repeat, however, that the pronouncement represented a distinct step in advance and that there is at least a chance that it may be followed by the other steps necessary to realize in fact the great object sought.

A further resolution of the Assembly of 1927 deserves to be mentioned, namely, the appointment of a new committee on arbitration and security to consider not only the problem of disarmament but also such means as might, if adopted, contribute to that feeling of security which is now generally admitted to be an essential condition of any general and thorough-going reduction of armaments. Among such means suggested for study by the committee are, the more general acceptance by States of the optional clause of the Statute of the Permanent Court of International Justice, the procedure of conciliation and other processes of pacific settlement, the mediatory action of the League, the extension of arbitration by special or general agreements, etc.

These two decisions of the Eighth Assembly indicate the steady growth of public sentiment in favor of pacific settlement of international differences and the determination of the Assembly to promote its advance by such means as seem practicable.

J. W. GARNER.

LEGAL POSITION AND FUNCTIONS OF CONSULS

The Committee of Experts for the Progressive Codification of International Law, at its third session in Geneva, held March–April, 1927, voted to include in the list of questions to be submitted for the consideration of the members of the League of Nations and other governments this question of the legal position and functions of consuls. The report of the subcommittee, composed of Dr. J. Gustavo Guerrero, of Salvador, and Dr. A. Mastny, of Czechoslovakia, was also submitted at the same time. The conclusions of this subcommittee are as follows:

> *Exequatur.* Only when the exequatur has been granted may the consul communicate with the authorities and, generally speaking, perform his other duties. He cannot claim any privilege until he has received this document. The exequatur may be refused, or even withdrawn, without giving his government a right to demand explanations.
>
> *Consular archives and correspondence.* The consular archives are inviolable. The same rule should apply to official correspondence.
>
> *Immunity from civil jurisdiction.* The immunity from civil jurisdiction which is accorded to diplomatic agents cannot be applicable in a general manner to consuls, who should only enjoy such immunity in connection with the exercise of their functions.
>
> *Immunity from criminal jurisdiction.* Consuls do not possess this immunity.
>
> *Right of asylum.* Consuls do not possess this prerogative.
>
> *Taxation.* Exemption from direct taxes should be accorded to "consuls de carrière," not carrying on trade in the country where they exercise their functions.

Mention was also made in this report of the desirability of drawing a distinction between the rights of "consuls de carrière" and those of honorary consuls.

It will be seen that these conclusions amount to little more than a skeleton outline, limited in scope, and accompanied by cursory suggestions of the reasons for such conclusions. The report, therefore, cannot be said to be of much value in throwing light upon the nature of the problems presented. It only serves to raise the larger question of the desirability of a universal agreement on the subject. When compared with the *projet* adopted by the International Commission of Jurists at its sessions in Rio de Janeiro, April 18 to May 20, 1927, which is to be submitted for the consideration of the Sixth International Conference of American States in Habana, 1928, its inadequacy may clearly be realized. Whatever exceptions may be taken to certain of the provisions of this *projet*, it is comprehensive in scope and details. It will be of great value as a basis for investigation and discussion in a conference on codification. It should be observed, in passing, that this *projet* is more restrictive of consular rights than the original *projet* (No. 23) submitted to the Commission at Rio de Janeiro by the American Institute of International Law. It also fails to define with sufficient precision the

exact rights of consuls in such important respects as arrest for crimes, and taxation. Much more liberal and precise in definition are the provisions of Articles XVII–XXVIII of the Treaty of Friendship, Commerce, and Consular Rights between the United States and Germany, which was ratified in 1925.[1] As observed by Prof. Irvin Stewart in his admirable article on the subject in this JOURNAL (April, 1927), the treaty has no equal for clarity of statement among those to which the United States has been a party.

The total impression created by these three documents, namely, the recommendations of the Committee of Experts of the League of Nations, the Commission of Jurists in Rio de Janeiro, and the provisions of the treaty between the United States and Germany, is that the subject would seem to be peculiarly suitable for clarification and codification. All the more so, when one realizes that at the present time the rights of consuls are to be ascertained first, from general and specific treaty provisions, subject, in many cases, to the effect of the most-favored-nation clause; second, from diverse national legislation; and third, from general usage. The dignity and the usefulness of this historic institution would seem to merit a serious attempt to bring order out of confusion, and to reduce to the form of a universal code the exact legal position and functions of consuls.

PHILIP MARSHALL BROWN.

ASOCIACIÓN FRANCISCO DE VITORIA

In Roman history, the month of March is known to us by its Ides, which we are asked to remember. In the development of international law there are what may be called the Ides of March which internationalists recall, for on the 18th of that month, in the year 1625, the first systematic treatise on international law in its then entirety, was first offered for sale at the fair of Frankfort-on-the-Main. Three centuries later, the tercentenary of the publication of this epoch-making work was celebrated in different parts of the world, and most elaborately at The Hague, of which city Grotius was at one time the ornament and the hope.

Dr. Loder, a distinguished citizen of The Netherlands, was President of the Institute of International Law, meeting in the summer of 1925 at The Hague, and he appropriately devoted his presidential address to the services of his distinguished countryman. During the course of the session, Baron Descamps, a former President of the Institute of International Law, and an influential member of the first Peace Conference at The Hague, delivered an address at the tomb of Grotius in the church of The Hague where the mortal part of him was laid to rest. A more popular demonstration was organized by a group of his countrymen, and a medal struck for the occasion.

It occurred to the members of the committee in charge, of which Mr. M.

[1] Supplement to this JOURNAL, Vol. 20 (1926), p. 4.

W. F. Treub, a former Minister of Finance, was Chairman, and Mr. Ch. G. J. van Mandere, Secretary, that the celebration would be incomplete unless a tribute were made in some way to Francisco de Vitoria, and Francisco Suárez. Therefore, the committee made a pilgrimage to Spain. It laid a wreath upon the monument to Suárez—founder of the science of international law—in his native city of Granada. In Madrid, where the committee was received by Mr. José de Yanguas Messia, then Minister of Foreign Affairs, there were more elaborate ceremonies. A reception was held in the Academy of Jurisprudence, where addresses were delivered, and the gold medal struck for Grotius was presented as an honor to the memory of Suárez. The committee then proceeded to Salamanca, where Francisco de Vitoria had delivered his two disquisitions "On the Indians Recently Discovered" (some forty years previously) and "On War" which the Spaniards might, in appropriate cases, wage against the Indians of the New World—disquisitions which, in miniature, outline the law of peace and of war, which Grotius, within a century, was to state in an enlarged and systematic form.

The publicists of Spain rightly looked upon the visit of the Netherland committee as an act of homage, especially to their great countryman, Francisco de Vitoria, who is beginning to be recognized as the founder, not only of the modern school of international law, but of modern international law itself. The visit of the committee was not merely an international event, as it might be looked upon by the Netherlanders, but a national event of the utmost importance to Spanish publicists solicitous for the reputation and prestige of their country. Therefore, April 21–23, 1926, the days spent by the Netherland Committee in Salamanca, were days of rejoicing on the part of the Spanish publicists, and of homage on the part of the Netherlanders, who preesnted to the university the gold medal of Grotius. It was accepted, on behalf of the university, by its distinguished rector, Don Enrique Esperabé Arteaga. On the same occasion an inscription was placed in the large hall, called *De Profundis*, of the Convent of San Esteban, of which Vitoria was a member. But it was something more than a day of rejoicing. It was, in effect if not in form, a celebration of the four hundredth anniversary of Francisco de Vitoria's appointment to the chair of theology in the University of Salamanca, from which he gave, for the first time, an acceptable definition of international law and of its sources, and professed its principles applied to the concrete facts of international life.

Two notable addresses were delivered on this occasion (April 20th and 21st) by Dr. Camilo Barcia Trelles, professor of international law in the University of Valladolid, of whom and of which, the secretary of the Netherland committee has said: "We were only able to attend one of these lectures . . . but could appreciate the oratorical talents of this learned man and perceive how the almost filled hall of the university hung upon his words, a storm of applause interrupting his lectures."

Among the guests who attended the celebration were Dr. Eduardo Callejo,

a former professor of natural law at the University of Valladolid and actually Minister of Instruction of the present government, and Mr. Fernandez Medina, Minister of Uruguay to Madrid. It occurred to the latter that the occasion was one of more than passing importance; that it was, indeed, noteworthy, and should, if possible, be rendered memorable. He therefore made the suggestion that an association in honor of Francisco de Vitoria should be formed, if this were agreeable to the Government of Spain, the members of which should be publicists of Spain, of Portugal, and of the Latin American Republics of Peninsular origin, with provision for honorary members from what might be called foreign countries. The idea, expressed in an admirable address, met with instant approval, and the *Asociación Francisco de Vitoria* has come into being. Of this association the distinguished Minister of Foreign Affairs, and now President of the National Assembly, Mr. José de Yanguas Messia, was chosen president, and its proponent, Mr. Medina, vice president.

A year later, the Francisco de Vitoria Chair in the University of Salamanca was established, with the approval and support of the government. This chair is to be held, not by a single professor, but by various professors, delivering courses on phases of international law, their appointment being vested in the association. This, however, is but one of the activities of the association. Among its other objects is the publication of the masterpieces of the Spanish publicists of the sixteenth century who, in the opinion of the association, founded the modern law of nations. The editions of their works are difficult to obtain, and more difficult to understand. They are, for the most part, large volumes printed in a Latin which is not easy to read, and requiring special knowledge on the part of those who would wish to consult them. The association, therefore, contemplates the publication of carefully edited Latin texts with Spanish, French and probably English translations. The first of these is to make its appearance shortly, a hitherto unprinted and overlooked treatment of the laws of war forming a part of Vitoria's commentary upon St. Thomas Aquinas.

Internationalists in all parts of the world must wish the association well. In the meantime, the chair of international law was inaugurated on November 10th of this year by an address on Vitoria by Father Getino, of the Dominican Order, who has published a life of Vitoria, and is regarded as an authority in matters concerning him; and on November 11th and 12th by two full length addresses on Vitoria's contributions to international law, by the writer of the present comment.

A distinguished German writer, Joseph Müller, has just published *Die Friedensvermittlungen und Schiedssprüche des Vatikans bis zum Weltkriege 1917. Sammlung ausgewählter Aktenstücke über die Friedenstätigkeit des Heiligen Stuhles*, the first of a two-volume work on *Das Friedenswerk der Kirche in den letzten drei Jahrhunderten. Die Diplomatie des Vatikans im*

Dienste des Weltfriedens seit dem Kongress von Vervins 1598.[1] In the opening paragraphs of the first volume, appropriately dedicated to the present sovereign of Spain, he makes some observations of special interest to the good people of that country, and of general interest to the world at large: "Spain is the home of great philanthropic ideas. The Spanish champions of international law and of universal peace enjoy the glory of immortality, and because of this other peoples may well envy the Spanish nation." (p. 1)

And he continues, "International law in its entirety is founded on the law of the interdependence of States. . . . Neither to the philanthropic spirit of the Greeks nor to that of the Romans was it permitted to expound scientifically the law of interdependence. It was, rather, reserved to the West to accomplish this great task: to the Spanish masters of natural law, Brother Francisco de Vitoria and Father Francisco Suárez." (p. 1)

"It is not an accident that this merit belongs to Spain, and in Spain to the University of Salamanca, since the activity of Vitoria and of the other Spanish masters appears in the epoch of an historical revolution." (p. 1) "The voice of humanity never sounded more clearly and more naturally than in the opinions of Vitoria on the treatment of the Indians, with which he replied to the Emperor." (p. 2)

Mr. Müller's views are so clear, precise, definite, attributing to Francisco de Vitoria the paternity of international law, which, he also says, originated within the Catholic Church, that it seems better, in order to obviate misunderstanding which so often results from a translation, to reproduce his exact language in the Spanish dedication of his volume to his Majesty the King of Spain:

> Si el honor del "Padre de la ciencia del derecho internacional" puede ser a alguien impugnado a ningún otro más que a Fray Francisco de Vitoria puede serlo. Vitoria no es sólo el primero que usa el término técnico de *jus inter gentes;* su Derecho internacional abarca a toda la humanidad, a todo el mundo cristiano y no-cristiano del mismo modo que el firmamento encierra a todos los hombres y a todos los pueblos . . . (p. 3).
>
> . . . El derecho internacional se fundó en la Iglesia católica y, después de Grocio, fué cultivado por los autores protestantes. Es una deuda descuidada del mundo civilizado, de acordase agradecido de las doctrinas filantrópicas de Francisco de Vitoria. (p. 15)

These are the views of a foreigner, and when the *Asociación Francisco de Vitoria* has completed its self-imposed task, they are not unlikely to be the views of foreigners.

JAMES BROWN SCOTT.

[1] Berlin: Deutsche Verlagsgesellschaft für Politik und Geschichte, 1927. pp. 483. Index. M. 25–30.

CONCERNING DAMAGES ARISING FROM NEGLECT TO PROSECUTE

In cases where resident aliens have been attacked by individuals or mobs and the delinquency of the territorial sovereign has been confined to neglect in the matter of the prosecution of the wrongdoers, diplomatic interposition and demands for an indemnity in behalf of the victims have been the usual consequence, at least when no ample remedy was locally available. Doubtless, in some cases, such neglect, although subsequent to the acts of violence, has caused additional injury to the claimants as when, for example, it has served to deprive them of the means of ascertaining the identity of their assailants and of subjecting them to civil actions for damages.[1] The amount of indemnity sought or obtained by means of diplomatic interposition or through the awards of arbitral tribunals has, however, oftentimes appeared to be out of proportion to the pecuniary losses sustained by claimants in consequence of the bare neglect to prosecute.[2] This circumstance justifies careful inquiry as to the correct explanation of what has taken place and of what may fairly be anticipated. Of late, tribunals have sought anew to make clear the reasons for their own action, and in so doing to enunciate the theory by virtue of which damages should be assessed.[3]

It has been declared that the State which has neglected to prosecute "has transgressed a provision of international law as to State duties," and that "the damage caused by the government's negligence is the damage resulting from the non-punishment of the murderer," and effort has been made to measure damages according to the effect of this particular delict.[4] In so doing, however, a tribunal is likely to find that the claimant has suffered in fact slight pecuniary loss in consequence of the governmental neglect, and may be put to it to show a solid basis for the awarding of substantial dam-

[1] "If the government had not committed its delinquency, if it had apprehended and punished Carbajal, Janes' family would have been spared indignant neglect and would have had an opportunity of subjecting the murderer to a civil suit." (van Vollenhoven, Presiding Commissioner, in Janes Case, Docket No. 168, General Claims Commission, United States and Mexico, Convention, Sept. 8, 1923, this JOURNAL, Vol. 21, p. 362, at p. 367.)

[2] See communication of Mr. Hay, Secy. of State, to Mr. Straus, Minister to Turkey, March 25, 1899, For. Rel. 1899, 766–767, Moore, Dig., VI, 794, concerning the Lentz case.

[3] See, for example, Janes Case, *loc. cit.*, embracing a separate statement regarding damages by Nielsen, Commissioner, *id.*, 371. See also separate opinion of same Commissioner in the Neer Case, Docket No. 136, before same commission, this JOURNAL, Vol. 21, p. 557; Kennedy Case before same commission, Docket No. 7, printed herein, *infra*, p. 174; West Case, before same commission, Docket No. 241; Richards Case, before same commission, Docket No. 22; De Galvan Case, before same commission, Docket No. 752; Massey Case, before same commission, Docket No. 352, this JOURNAL, Vol. 21, p. 783.

[4] van Vollenhoven, Presiding Commissioner, in Janes Case, *loc. cit.*, p. 357.

According to Article III of the Resolution Concerning the Responsibility of States adopted by the Institute of International Law, at Lausanne in 1927: "*L'Etat n'est responsable, en ce qui concerne les faits dommageables commis par des particuliers, que lorsque le dommage résulte du fait qu'il aurait omis des prendre les mesures auxquelles, d'après les circonstances, il convenait normalement de recourir pour prévenir ou réprimer de tels faits.*"

ages;[5] and if such damages are awarded, they appear to be compensatory, not merely for the consequence of the neglect to prosecute, but rather for that resulting from something quite extrinsic to it. In a word, they seem to satisfy a fiscal loss with which the mere governmental delinquency lacks a causal connection. For that reason, the theory mentioned fails to offer a satisfactory explanation of the awards of arbitrators who are inclined to support it.[6]

It is believed that the weight of judicial opinion manifests respect for a different theory that measures damages according to the pecuniary loss sustained at the hands of the original wrongdoers, and compensates the claimant accordingly.[7] It is said in substance that when the State neglects to prosecute it is to be deemed to approve of or condone the wrongful acts of those who did violence to the claimant, and to assume a responsibility therefor.[8] The result is not unreasonable. As was said by a careful arbitrator in 1927:

> Assuredly the theory repeatedly advanced that a nation must be liable for failure to take appropriate steps to punish persons who inflict wrongs upon aliens, because by such failure the nation condones the wrong and becomes responsible for it, is not illogical or arbitrary.[9]

The condonation theory affords a more satisfactory explanation than that which imputes complicity in the commission of acts of violence where none

[5] Thus in the Janes Case, the Presiding Commissioner declared: "Not only the individual grief of the claimants should be taken into account, but a reasonable and substantial redress should be made for the mistrust and lack of safety, resulting from the government's attitude." (This JOURNAL, p. 370.)

[6] States are unlikely to agree to confer jurisdiction upon a claims commission to award punitive damages for the benefit of a national of either contracting party. Parker, Umpire of the Mixed Claims Commission, United States and Germany, declared in his opinion in the *Lusitania* cases, November 1, 1923: "The industry of counsel has failed to point us to any money award by an international arbitral tribunal where exemplary, punitive, or vindictive damages have been assessed against one sovereign nation in favor of another presenting a claim in behalf of its nationals." (Consolidated Edition of Decisions and Opinions, 1925, 17, 27.) It is believed that in awarding substantial damages on the theory mentioned above in the text the claims commission may in reality fulfill a "punitive mission."

[7] "It is clear that arbitral tribunals in assessing damages for the failure of authorities to punish wrongdoers have taken account of the damage caused by the wrongful acts of the culprits for which governments have been held responsible." (Nielsen, American Commissioner, in the Janes Case, this JOURNAL, Vol. 21, p. 374). See Davy Case, Ralston's Report, 410, 412.

Cf. Edwin M. Borchard, in this JOURNAL, Vol. 21, pp. 516, 517.

[8] See, for example, Cotesworth and Powell Case, Moore, Arbitrations, II, 2050, 2082, 2085; Opinion of Little, Commissioner, in Case of Amelia de Brissot, *id.*, III, 2967; Opinion of Findlay, Commissioner, in same case, *id.*, 2969.

[9] Separate statement of Nielsen, American Commissioner, in Janes Case, this JOURNAL, Vol. 21, p. 371 at p. 373.

was in fact apparent.[10] A State may by its neglect condone conduct without becoming an accomplice of the actor. To forgive is not necessarily to become a sharer of the guilt of him who is forgiven. Be that as it may, inaction that betrays unconcern on the part of a State whether the penalties of the law are to be visited upon him who, in contempt of it, directs his criminal violence against a resident alien, deprives the State of defenses which it might normally set up. It can no longer maintain, as against the victim, that it is not answerable for the consequences of what has taken place. Thus, as the simplest explanation of the practice that sanctions the awarding of substantial damages, it may be said that a State which has failed in the performance of its international obligation in the matter of prosecution is not permitted to deny responsibility for damages caused by the criminal acts of individuals or mobs as measured by the pecuniary losses which they themselves have produced. This explanation does no violence to the facts; and it heeds the principle that damages should be computed in such a way as to disclose a causal connection between particular acts and losses resulting from them. The law, as so interpreted, penalizes a State for shortcomings by imposing a responsibility where none would normally be apparent; but damages flow directly from the acts for which the State is held responsible and are compensatory rather than penal in character.[11]

CHARLES CHENEY HYDE.

AUSTRIAN AND HUNGARIAN "DEBT" CLAIMS

Some of the extraordinary results of the adoption by our treaties of peace with the Central Powers of the provisions of the European peace treaties are manifested in Administrative Decisions I and II of the Tripartite Claims Commission (United States, Austria and Hungary).[1] By the Treaties of Vienna and Budapest, incorporating the Knox-Porter Resolution, and by the Claims Agreement executed pursuant thereto, the Claims Commission was given jurisdiction of claims against Austria and Hungary arising out of the

[10] In the Poggioli Case, Ralston's Report, 847, 869, complicity was deemed to exist.

"The rule of the law of nations is that the Government which refuses to repair the damage committed by its citizens or subjects, to punish the guilty parties or to give them up for that purpose, may be regarded as virtually a sharer in the injury and as responsible therefor." Mr. Fish, Secy. of State, to Mr. Foster, Minister to Mexico, No. 21, Aug. 15, 1873, MS. Inst. Mex. XIX, 18, citing Calvo, *Droit Int.*, II, 397, Moore, Dig., VI, 655.

[11] The law rather than the court penalizes the delinquent State. The function of the tribunal is to determine primarily whether the particular State charged with neglect to prosecute has failed to fulfill its international obligation. If convinced that the State has so failed, the tribunal, guided by what it understands to be the law of nations with respect to responsibility, makes enunciation of the penalty that that law prescribes, and thereupon proceeds to ascertain what in fact are the damages resulting from the acts for which the State is deemed liable. The damages awarded are essentially compensatory for the loss occasioned by those acts.

[1] This JOURNAL, XXI, 599 *et seq.*

Reparation (Part VIII) and Economic (Part X) clauses of the Treaties of St. Germain and Trianon, respectively. Included in Part X are the provisions for the Clearing Office, by which debts owed respectively by nationals of the defeated to the nationals of the victor Powers, and *vice versa*, are "cleared" through governmental agencies. Provision is therein made for reciprocity, and for the valorization of kronen (or mark) debts at the prewar (month before the war) rate of exchange, with governmental assumption of responsibility for the private debts. While the system itself, as a method of liquidating great numbers of debts may be approved, the methods by which the proceeds of the debts of Allied nationals to "enemy" creditors were, instead of being paid to the creditors, "charged" with responsibility for claims of various kinds against enemy governments, cannot command support. It would seem to encounter those very objections which Lord Ellenborough so forcibly expressed in Wolff *v.* Oxholm, against the confiscation of private debts by Denmark.[2]

The United States did not accept the Clearing Office provisions, for a variety of reasons;[3] but in the Claims Agreement establishing the Tripartite Claims Commission jurisdiction was conferred over claims arising out of (1) injuries to "property, rights and interests" of American citizens in the entire Austro-Hungarian Empire, (2) war damages, and (3) "debts owing to American citizens by the Austrian and/or the Hungarian Governments or by their nationals." The latter clause appears to have been placed in the Claims Agreement with Germany at the last moment by an American official, in order to do for American mark creditors what the Clearing Office procedure did for Allied mark creditors. It was copied verbatim into the Austro-Hungarian Agreement. But whereas the Clearing Office procedure is reciprocal, the Claims Agreement operates only for the benefit of American creditors. By the Knox-Porter Resolution of July 2, 1921, incorporated in the Treaties of Vienna and Budapest, the United States is privileged to retain the sequestrated property in the hands of the Alien Property Custodian until the ex-enemy countries make "suitable provision for the satisfaction of" the claims of American citizens,—not claims of the United States Government, as has occasionally been suggested. In a previous editorial,[4] attention has been called to the fact that the Knox-Porter Resolution, in holding the property until *all* private claims are provided for, goes much beyond the privileges that would have been conferred by the adoption of the provisions of Article 297 of the Treaty of Versailles and the like articles of the other treaties.

The particular questions to be decided in Administrative Decision II were

[2] Wolff *v.* Oxholm (1817), 6 M. & S. 92. See this JOURNAL, Vol. XVIII, p. 524, note 4.

[3] Some of these are stated by Judge Parker, as sole Commissioner, in Administrative Decision, II, *supra*, p. 17, note 3. See also Baruch, The Making of the Reparation and Economic Sections of the Treaties, New York, 1920, p. 99, *et seq.*

[4] This JOURNAL, Vol. XIX, p. 355.

(1) the liability of Austria or Hungary to American creditors for "kronen" debts owed by Austrian or Hungarian debtors respectively, (2) the rate of exchange to be applied to such debts and, possibly, (3) the method of payment. The Austrian and Hungarian Agents contended that inasmuch as Austria-Hungary had applied no "exceptional war measures" (prohibition of payments, appointment of Alien Property Custodians, etc.) to American property, including debts due American citizens, therefore Austria and Hungary were not responsible for such private debts. This the Commissioner conceded, if it was true in fact that exceptional war measures (Section IV, Part X of the European treaties) had not been applied. In the case of the German "mark" debtors, the German Government had by agreement assumed responsibility for the debts, because exceptional war measures had admittedly been in force, and also agreed with the United States on their valorization at an exchange rate of 16 cents per mark, with interest at 5 per cent from January 1, 1920. In the case of Austria and Hungary, the State Department, for reasons not known to the writer, seemed to oppose a similar agreement and thus forced on the Commissioner the duty of rendering a decision in the matter which, for reasons presently to be mentioned, affords some occasion for anxiety as to American policy.

After holding that Austria [Hungary] in the absence of exceptional war measures, was not liable for private debts or for their valorization at the pre-war (November, 1917) rate (9.36 cents per krone), the Commissioner nevertheless held that the liability of Austria [Hungary] might arise if Congress, by confiscating the private property in the hands of the Alien Property Custodian, gives life to Article 249 [232] (h) and (j) and paragraph 4 of the Annex to Section IV of the Treaty of St. Germain (Trianon), for it is only under such circumstances that valorization becomes possible. Should Congress decline to take such a step, a power considered by the Commissioner as vesting in Congress under the Knox-Porter Resolution, then the American "kronen" creditor has only a paper kronen claim against a private debtor which, under recent decisions of the Supreme Court,[5] cannot be converted into a dollar debt. Valorization thus depends on confiscation; and in that event, Austria and Hungary come under a treaty obligation to reimburse the expropriated owners. Only in this indirect and contingent fashion is the Austrian or Hungarian Government charged with responsibility for "kronen" debts. The Commissioner felt impelled to this conclusion by his interpretation of Article 249 of the Treaty of St. Germain (232, Trianon, 297 Versailles), to the effect that "matters provided for in Article 249 [232]" included liquidation of Austrian and Hungarian property for the satisfaction of private debts, which in that event had to be valorized at the pre-war rate

[5] Deutsche Bank *v.* Humphrey (1926), 272 U. S. 517, 519, in which Justice Holmes says, for the majority: "An obligation in terms of the currency of a country takes the risk of currency fluctuations and whether creditor or debtor profits by the change the law takes no account of it." Zimmermann *v.* Sutherland, 274 U. S. 253.

in accordance with Section III (Clearing Office) of the treaties. He also claimed authority for this conclusion in certain decisions of the Mixed Arbitral Tribunals.[6]

The result involves certain unusual effects. The Commission assumes jurisdiction over an absent debtor, who is subjected not to an award, but to a finding of fact which could only become an award in the event that Congress employs its supposed prerogative of now confiscating the property in the hands of the Alien Property Custodian. Judge Parker by no means can be deemed to approve such a solution of the problem. But the legality of the solution itself is open to question in view of the fact that the Knox-Porter Resolution is the municipal law of the United States, and not the diametrically opposed confiscatory provisions of the European treaties. The general reservation of the privileges accorded by the European treaties enabled the United States, it is believed, to designate to the enemy countries the sections of which it desired to avail itself, but by the adoption of the Knox-Porter Resolution Congress would seem to have definitely repudiated the contrary provisions of the unratified European treaties. Two conflicting provisions, one general and a part of an unratified treaty, the other specific and enacted by Congress, can hardly be in force simultaneously. It seems to have been so understood by Senator Knox. Under the resolution Congress declares its purpose, and thus the rule of law, to "retain" the property temporarily until "suitable provision" is made for the satisfaction of certain claims. "Suitable provision" becomes by the Berlin, Vienna and Budapest treaties a treaty term and can hardly be unilaterally interpreted. Unless, therefore, Austria and Hungary concede that "suitable provision" cannot be made, it would seem difficult legally to confiscate the alien property, even if as a matter of policy such a contingency were supposable.

But assuming that Congress were to decide upon such a policy, the result would be that A's property would be taken to discharge a debt of B. B has little or no opportunity to defend and perhaps no special interest in doing so, for unless he happens to own sequestrated property, it will not be his property that is taken for the debt. The Austrian [Hungarian] Government has only a remote interest in the outcome, for the award or finding of fact will not run against the government, and it could only become liable to reimburse at home the citizen whose property is confiscated. Indeed, in the case of Hungary, it is understood that the sequestrated property amounts to much less than the kronen debts valorized, so that Hungary might have but a slight pecuniary interest in the issue. The amount and the value of the award depend not on the merits of the claim, but on the method adopted for its payment. If

[6] National Bank of Egypt *v.* German Government and Bank für Handel and Industrie, *Recueil*, V, 26; Margaret Williams *v.* Berliner Lebens-Versicherungs-Gesellschaft, *Recueil*, V, 322. The dicta in these cases, where the award for the debt was made against the private debtor, do not necessarily support the award. *Cf.* Stevenson *v.* Banque Nationale de Bulgarie, *Rec.*, II, 77.

Congress does not confiscate, it is a kronen debt only; if Congress does, it is automatically valorized at 9.36 cents per krone, plus interest. In that respect, the issue gives rise to a certain anxiety for American policy, for Congress in theory is faced with the alternative of confiscating or of letting the American kronen creditor go practically unpaid. Possibly the Governments of Austria and Hungary will offer the United States some form of settlement which will enable Congress to escape this awkward dilemma.[7]

EDWIN M. BORCHARD.

THE STYLE AND TITLES OF HIS BRITANNIC MAJESTY

The "Crown" may be a symbol of the unity of the British peoples and their common link with perpetuity, but it is not an unchanging conception. For the third time in hardly more than half a century, the "style and titles" of His Britannic Majesty have recently been changed. Since the royal proclamation of May 13, 1927,[1] the British sovereign must be entitled, in the Latin tongue: "*Georgius V Dei Gratia Magnae Britanniae, Hiberniae et terrarum transmarinarum quae in ditione sunt Britannica Rex, Fidei Defensor, Indiae Imperator;*" and in the English tongue: "*George V by the Grace of God of Great Britain, Ireland and the British Dominions beyond the Seas King, Defender of the Faith, Emperor of India.*" The royal proclamation effecting the recent change recites the authority of the Act of the Parliament of the United Kingdom of Great Britain and Ireland, of April 12, 1927, by which it was enacted:[2]

> It shall be lawful for His Most Gracious Majesty, by His Royal Proclamation under the Great Seal of the Realm, issued within six months after the passing of this Act, to make such alteration in the style and titles at present appertaining to the Crown as to His Majesty may seem fit.

This Act followed a recommendation of the Imperial Conference of 1926,[3] which was referred to in the royal proclamation as a "recommendation from the representatives of Our Governments in Conference assembled." The Imperial Conference had adopted a report of an Inter-Imperial Relations Committee recommending that "subject to His Majesty's approval, the necessary legislative action should be taken" to effect the change actually made.[4]

[7] On a previous occasion, we have expressed the opinion that it was a serious legal error of the peace treaties to assume that "Austria" and "Hungary" were the legal successors of the Austro-Hungarian Empire. This JOURNAL, Vol. 19, pp. 358–359.

[1] London Gazette, May 13, 1927, p. 3111 (No. 33274).

[2] 17 and 18 George V, c. 4, §1.

[3] Parliamentary Paper, 1926, Cmd. 2768.

[4] *Quaere*, as to commas before and after "by the Grace of God." These were in the title recommended, but their addition was apparently not effected. The title is often written to include the commas.

By the royal proclamation of May 13, 1927, the King

> appoint[s] and declare[s], by and with the advice of Our Privy Council, that henceforth so far as conveniently may be, on all occasions and in all instruments wherein Our style and titles are used, the following alteration shall be made in the style and titles at present appertaining to the Crown, that is to say, in the Latin tongue, for the word "Britanniarum" there shall be substituted the words "Magnae Britanniae, Hiberniae," and in the English tongue, for the words "the United Kingdom of Great Britain and Ireland and of" the words "Great Britain, Ireland and."

The previous title was established by the royal proclamation of November 4, 1901.[5] By Act of August 17, 1901,[6] Parliament had authorized a change "with a view to the recognition of His Majesty's dominions beyond the seas," and the royal proclamation of November 4, 1901, added after the word "Ireland" in the English tongue, the words "and of the British Dominions beyond the Seas." On April 28, 1876, a royal proclamation under statutory authority[7] had added to Her Majesty's title in the English tongue, the words "Empress of India."[8] Theretofore, the title was that established on January 1, 1801, when by a royal proclamation authorized by the Act for the Union of Great Britain and Ireland of July 2, 1800,[9] the title was declared to be, in the English tongue: "George the Third by the Grace of God of the United Kingdom of Great Britain and Ireland King, Defender of the Faith."[10] The title "Defender of the Faith" had been conferred on Henry VIII by Pope Leo X, and had been confirmed by Parliament in 1543.[11]

The recent change is significant for raising several questions. Has it now become a part of British constitutional law that a change in the royal title may be made only with previous statutory authority? Each of the changes since 1800 has been authorized by the Parliament at Westminster. Prior to that time the necessity for statutory authority was, perhaps, not clear. If parliamentary authorization be necessary, is it sufficient that the authorization be given by the Parliament at Westminster alone? It was announced by the Imperial Conference in 1926 that the "position and mutual relation" of the members of the "group of self-governing communities constituting Great Britain and the Dominions" is to be defined as follows:[12]

> They are autonomous Communities within the British Empire equal in status, in no way subordinate one to another in any aspect of their

[5] London Gazette, November 4, 1901, p. 7135 (No. 27371).
[6] 1 Edw. VII, c. 15.
[7] 39 Vict., c. 10.
[8] London Gazette, April 28, 1876, p. 2667 (No. 24319).
[9] 40 Geo. III, c. 67.
[10] London Gazette, December 30, 1800–January 3, 1801, p. 2 (No. 15324).
[11] See 35 Henry VIII, c. 3. This statute was repealed by 1 and 2 Philip and Mary, c. 8, §20, and revived by repeal of latter Act in 1 Eliz., c. 1, § 20. See also 6 Halsbury, Laws of England, p. 360, note.
[12] Parliamentary Paper, 1926, Cmd. 2768, p. 14.

> domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.

Has each of these "self-governing communities" an equal voice in a matter so important as the title of His Majesty? No legislation seems to have been passed by the Parliament at Ottawa similar to the Act of April 12, 1927, passed at Westminster. The Dominion of Canada was, perhaps, less affected by the particular alteration made. This could not be said of the Irish Free State, however, for the change related primarily to Ireland. Yet it seems that the change was not authorized by the Oireachtas of Saorstát Eireann.[13] Has the Parliament at Westminster, by reason of its historic position, a special competence in this respect which is not possessed by the parliaments of others of the "autonomous Communities" which are "equal in status"? The royal proclamation of May 13, 1927, refers to the recommendation of the Imperial Conference of 1926, at which the Prime Ministers of the various Dominions and the President of the Executive Council of the Irish Free State represented their respective governments. Is the equivalent of such a recommendation to be required for any future change of the title?

A question arises also out of the use of the word "Ireland." To what does "Ireland" refer, as the word is now used in the title of His Majesty? Does it refer to the Irish Free State, or to Northern Ireland, or to both of them? Or is it merely a geographic expression for an island which has two separate governments? It would seem that the United Kingdom of Great Britain and Ireland, which has existed since the union of the two kingdoms on January 1, 1801, under the Act of Union of July 2, 1800, has now passed out of existence, though the Act of Union remains unrepealed. Under the enactment of April 12, 1927, the Thirty-fourth Parliament of the United Kingdom and Ireland became the Thirty-fourth Parliament of Great Britain and Northern Ireland.[14] Henceforth the expression "United Kingdom" in any Act "shall, unless the context otherwise requires, mean Great Britain and Northern Ireland."[15]

Lord Birkenhead explained the new title of the King to be "a descriptive Title upon geographical lines of the territories of which His Majesty is King. It does not define and it does not purport to define the various political units composing the Empire."[16] Is it proper to speak of His Majesty as the King of Great Britain and Northern Ireland? Perhaps no more so than to speak of him as the King of the Dominion of Canada or of the Commonwealth of Australia. The style and titles of His Majesty would seem to be one and

[13] The point was made by Lord Haldane in the debate in the House of Lords, March 23, 1927, in justification of the use of the Prerogative.

[14] 17 and 18 George V, c. 4, §2.

[15] *Ibid.*, §3.

[16] 66 Parliamentary Debates (Lords), pp. 722–3.

indivisible. This has been explained by the Secretary of State for Dominion Affairs and Colonies as follows:[17]

> The Crown in the British Empire is one and undivided. There was a time not so long ago when the King of England was also the King of Hanover, but he was King in two different capacities, the wearer of two different crowns, and indeed the holder of crowns having different laws of succession; and so the time came when the two crowns separated. There is no such division within the British Empire. The King is not King of Great Britain in one capacity, King of Australia in another. He is King in the same sense and as wearer of the same Crown of the whole Empire, and from that follows one vitally important aspect of the whole Constitution, namely, that whatever may be the forms of government there runs through the whole Empire the common status, the common nationality of a subject of the King.

Yet in the House of Commons, the Secretary of State for the Home Department said that the use of the word "Ireland" emphasized "the fact that His Majesty is King of Great Britain, King of Ireland, King of the Dominions beyond the Seas, and Emperor of India."[18]

The recent change does not solve difficulties which arise in referring to the collection of British communities. Is there such a thing, legally speaking, as the "British Empire"? Or is that, too, merely a geographic expression? The "British Empire" was named as a party to the Treaty of Versailles. It is a member of the League of Nations, of which the Dominion of Canada, the Commonwealth of Australia, New Zealand, the Union of South Africa, the Irish Free State and India are also members. Yet the style and titles of His Majesty make no reference to the British Empire. If it exists, it seems to have no Emperor. Is this term to be discarded and should we speak of the British "Commonwealth of Nations"? Both terms, "British Empire" and "British Commonwealth of Nations" were used by the Imperial Conference of 1926.[19] The new style of treaties makes no reference to the British Empire. When action is taken by His Britannic Majesty, is it taken on behalf of all the British peoples if no limitation be named?

The rôle in which representatives of His Britannic Majesty act ought to be recognized outside the British Empire. A failure to recognize it and a misconception of the title itself have led to an erroneous entitling of recent treaties between the United States and His Britannic Majesty in respect of the Dominion of Canada.[20] The convention for the preservation of the halibut fishery in the Northern Pacific Ocean, signed on March 2, 1923, was entered into by "the United States of America and His Majesty the King of

[17] 6 Journal of the Royal Institute of International Affairs, p. 16.

[18] 203 Parliamentary Debates, 5th Series, p. 1252.

[19] See Zimmern, The Third British Empire (1927).

[20] A glaring instance of misdescription is the reference in the Presidential proclamation of December 8, 1916, to the convention for the protection of migratory birds in the United States and Canada, as "a convention between the United States of America and the United Kingdom of Great Britain and Ireland." See U. S. Treaty Series, No. 628.

the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, Emperor of India;" its provisions relate only to the United States and Canada, and it was signed by a Canadian. It is described in the official United States publication[21] as a "convention between the United States and Great Britain"; but in a recent official Canadian publication[22] it is described as a "treaty between Canada and the United States of America."[23] The convention for the suppression of smuggling operations, signed on June 6, 1924, was entered into by "the United States of America and His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, in respect of the Dominion of Canada." It is described in the official United States publication[24] as a "convention between the United States and Great Britain in respect of Canada;" but in a recent official Canadian publication,[25] it is described as a "convention between Canada and the United States of America."[26] The treaty concerning the boundary between the United States and Canada, signed on February 24, 1925, was also made between the United States of America and His Britannic Majesty "in respect of the Dominion of Canada." But it, too, is described in the official United States publication[27] as a "treaty between the United States and Great Britain in respect of boundary between the United States and Canada."[28] It would seem more proper to refer to each of these later treaties, entered into expressly "in respect of the Dominion of Canada," as having been concluded between the United States and Canada, and the references to Great Britain in the United States Statutes are misleading. It is to be noted, however, that these references ante-date the Imperial Conference of 1926, the Royal Proclamation of May 13, 1927, and the arrival of the Canadian Minister at Washington.

MANLEY O. HUDSON.

[21] 43 Statutes at Large, p. 1841.

[22] Treaties and Agreements Affecting Canada in Force Between His Majesty and the United States of America, 1814–1925, p. 1923.

[23] See also 32 League of Nations Treaty Series, p. 94.

[24] 44 Statutes at Large, p. 2097.

[25] Treaties and Agreements Affecting Canada in Force Between His Majesty and the United States of America, 1814–1925, p. 1924. See also Statutes of Canada, 1926, p. v. In the British Treaty Series No. 39 (1925), Cmd. 2512, this convention is entitled, "Convention between Canada and the United States of America."

[26] See also 43 League of Nations Treaty Series, p. 225. The same divergence applies in the publications of the texts of the extradition convention signed on January 8, 1925, and of the treaty on the level of the Lake of the Woods, signed February 24, 1925.

[27] 44 U. S. Statutes at Large, p. 2102.

[28] In the British Treaty Series, No. 37 (1925), Cmd. 2510, this treaty is entitled, "Treaty between Canada and the United States of America." See, also 43 League of Nations Treaty Series, p. 239.

RESEARCH IN INTERNATIONAL LAW

On the initiative of the Faculty of the Harvard Law School, a group of Americans interested in international law has undertaken to organize a coöperative research in international law, dealing with the three topics which have been selected for the agenda of the Conference on Codification of International Law, to be held in 1929.

In 1924, the Fifth Assembly of the League of Nations, "recognizing the desirability of incorporating in international conventions or in other international instruments certain items or subjects of international law which lend themselves to this procedure," decided to set up a Committee of Experts "to prepare a provisional list of the subjects of international law the regulation of which by international agreement would seem to be the most desirable and realizable at the present moment." This Committee of Experts for the Progressive Codification of International Law, as it came to be called, is composed of seventeen jurists, of whom Mr. George W. Wickersham, President of the American Law Institute, is one. At its meeting in April, 1925, it chose eleven topics for investigation, and at its second meeting in January, 1926, a subcommittee reported upon each of these topics. With reference to some of them, questionnaires were prepared and circulated to the governments of all States. The governments' replies were considered by the Committee at its third session in March–April, 1927, and seven subjects were reported as "sufficiently ripe" for consideration by an international conference on codification. Of these seven, three were selected by the Eighth Assembly of the League of Nations in 1927, for consideration at the conference which is now envisaged for 1929: Nationality, Territorial Waters, and Responsibility of States for Damage done in their Territory to the Person or Property of Foreigners. The three subjects selected were among those approved by the Government of the United States in its reply to the questionnaires, as subjects concerning which "international arrangements . . . would serve a useful purpose and would therefore be desirable." The Government of the United States also added that it saw "no insuperable obstacles to the concluding of agreements on these general subjects."

The Eighth Assembly of the League of Nations decided to set up a small committee of five to prepare for the conference of 1929; this preparatory committee consists of Professor Basdevant (France), M. Carlos Castro Ruiz (Chile), Professor François (Netherlands), Sir Cecil Hurst (Great Britain), and M. Pilotti (Italy). The prospect for a conference in 1929 seems to make it desirable that the most thorough scientific preparation possible should be made to ensure its success. If it is not the first time in history that a diplomatic conference is to be held for the avowed codification of international law, the occasion nevertheless presents an opportunity for disinterested scholars to have their work considered in a way which cannot fail to give it influence. Inspired by the feeling that independent coöperative research by American scholars and jurists might greatly contribute to the advancement

of sound codification of international law, the Faculty of the Harvard Law School invited the coöperation of the most active men working in the field, to serve as an advisory committee for the organization of such research. Its invitation was accepted by the following: Mr. Chandler P. Anderson, Washington; Prof. Joseph W. Bingham, Stanford University; Prof. Edwin M. Borchard, Yale Law School; Prof. Philip Marshall Brown, Princeton University; Dean Charles K. Burdick, Cornell College of Law; Judge Benjamin N. Cardozo, New York; Prof. J. P. Chamberlain, Columbia University; Mr. Frederic R. Coudert, New York; Mr. William C. Dennis, Washington; Prof. Edwin D. Dickinson, University of Michigan Law School; Prof. Charles G. Fenwick, Bryn Mawr College; Mr. George A. Finch, Washington; Mr. Richard W. Flournoy, Washington; Mr. Raymond B. Fosdick, New York; Prof. James W. Garner, University of Illinois; Mr. Green H. Hackworth, Washington; Judge Learned Hand, New York; Prof. Amos S. Hershey, University of Indiana; Mr. Frank E. Hinckley, University of California; Mr. Charles E. Hughes, New York; Prof. Charles Cheney Hyde, Columbia University; Mr. Arthur K. Kuhn, New York; Dr. William Draper Lewis, Philadelphia; Mr. David Hunter Miller, New York; Mr. Roland S. Morris, University of Pennsylvania; Prof. Pitman B. Potter, University of Wisconsin; Prof. Jesse S. Reeves, University of Michigan; Mr. Elihu Root, New York; Dr. James Brown Scott, Washington; Prof. Ellery C. Stowell, American University; Mr. George W. Wickersham, New York; Prof. George Grafton Wilson, Harvard University; Mr. Lester H. Woolsey, Washington; and Prof. Quincy Wright, University of Chicago.

The necessary funds having been appropriated by the Commonwealth Fund, a first meeting of the Advisory Committee was held in Cambridge on January 7, 1928. Dean Roscoe Pound opened the meeting and made an introductory statement. Mr. George W. Wickersham was elected chairman of the committee, and an executive committee was created, composed of Joseph H. Beale, Manley O. Hudson, Charles Cheney Hyde, Eldon R. James, Francis B. Sayre, James Brown Scott, and George W. Wickersham. It was decided that the research should be undertaken along the general lines followed by the *Institut de Droit International* and the American Law Institute, with a director of research, with a reporter for each of the subjects to be considered by the 1929 conference, and with advisers to assist each of the reporters. Mr. Manley O. Hudson was chosen to be the director of research, and the reporters were named as follows: on Nationality, Mr. Richard W. Flournoy of Washington; on Territorial Waters, Prof. George Grafton Wilson of Harvard University; and on Responsibility of States for Damage done in their Territory to the Person or Property of Foreigners, Prof. Edwin M. Borchard of Yale University. It is hoped that the reports can be largely completed in 1928, so that they may be available in advance of the assembling of the conference now in prospect.

MANLEY O. HUDSON.

Annual Meeting of the American Society of International Law. The Twenty-second meeting of the American Society of International Law will be held in Washington on Thursday, Friday and Saturday, April 26th, 27th and 28th next, the formal opening to take place on Thursday evening with the presidential address of the Honorable Charles Evans Hughes, and the meeting to close on Saturday evening with a dinner at the New Willard Hotel. The Committee on Program has selected as topics for discussion the three subjects which have been found to be "ripe for codification" by the Committee of Experts of the League of Nations for the Progressive Codification of International Law, namely, Nationality, Territorial Waters, and Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners. As will be noted elsewhere in these columns, a general conference of the nations is planned to meet at The Hague in 1929 to consider the codification of these same subjects.

A *Third Conference of Teachers of International Law* will be held in Washington the first part of the same week of the annual meeting of the American Society of International Law. The Teachers Conference will be convened on Wednesday afternoon, April 25th, and will end on the afternoon of Thursday, the 26th. Invitations to this Conference are now being prepared, and will shortly be issued.

Carnegie Fellowships in International Law. The Division of International Law of the Carnegie Endowment for International Peace announces the continuation of its Fellowships in International Law for the academic year 1928–1929. In general, applicants must have a knowledge of the elements of international law, and a good knowledge of history, and it is desirable that at least two modern languages be furnished. Two classes of Fellowships will be awarded, Teachers' Fellowships, which carry a stipend of $1,500, and Students' Fellowships, which carry a stipend of $1,000. Study abroad is permitted, and a traveling allowance of $300 is available for a limited number of Teachers' Fellowships. An applicant who wishes to study abroad must be able to read and write the language of the foreign country in which he elects to study. Applications must be received before March 1st. Blanks and other information may be obtained from the Committee on International Law Fellowships, 2 Jackson Place, Washington, D. C.

Naturalization Certificates Final. Sometimes a *per curiam* decision of the Supreme Court of the United States is of the highest value. This is especially true of a recent case in which in six lines the court denied a petition for a writ of *certiorari* to the Circuit Court of Appeals in the case of the United States *v.* Sakharam Ganesh Pandit.[1] The meaning of this to the initiated is that naturalization having been given to a Hindu, and his right to naturalization having been affirmed by the District Court of the United States, it would be sustained on appeal to the District Court of Appeals and, on appeal

[1] Preliminary print of Vol. 273 U. S. Number 4, p. 759.

to the Supreme Court of the United States, affirmed as *res judicata*. The Court of Appeals affirmed, on November 1, 1926, in a careful opinion, after examining the authorities, the judgment of the District Court.[2] The Court of Appeals held that:

> It is thus conclusively established by the Supreme Court that a judgment granting a certificate of naturalization is a final judgment. . . .
>
> By the same token the judgment granting naturalization to the defendant, the right to citizenship having been distinctly put in issue, the United States appearing and contesting, and the issue directly determined by a court of competent jurisdiction, not having been modified or reversed, cannot now be disputed.

The decision in this case applies to a Hindu. The judgment of the Circuit Court of Appeals and the Supreme Court of the United States was in the case of a Hindu. It applies, of course, to all other persons naturalized under like circumstances, affirming their right to citizenship of the United States.

International Maritime Committee. The Amsterdam Conference of 1927 of the International Maritime Committee was mainly concerned with the compulsory insurance of passengers in order that there might be, rather than the varied national systems now prevailing, a reasonably uniform international system of insurance affording protection to passengers during sea transport. Attention was also given to plans for letters of indemnity which would enhance the credit of shipping documents, but no satisfactory agreement was reached. The matter of compulsory insurance has been before the committee for several years and will receive further consideration. Letters of indemnity will also be further considered. The wish was expressed that states embody in law as soon as possible the resolutions of the Brussels Conference, which are already before several of the national legislatures.

[2] *The United States Daily*, Tuesday, November 16, 1926, p. 10.

CHRONICLE OF INTERNATIONAL EVENTS

FOR THE PERIOD August 16—November 15, 1927.

(With references to earlier events not previously noted.)

WITH REFERENCES

Abbreviations: *B. I. I. I.*, Bulletin de l'Institut Intermédiaire International. *B. I. N.*, Bulletin of international news; *Clunet*, Journal du droit international; *Cmd.*, Great Britain, Parliamentary papers; *Cong. Rec.*, Congressional Record; *Cur. Hist.*, Current History (New York Times); *E. E. P. S.*, European Economic and Political Survey; *Europe*, L'Europe Nouvelle; *F. P. A. I. S.*, Foreign Policy Association Information Service; *G. B. Treaty Series*, Great Britain, Treaty Series; *I. L. O. B.*, International Labor Office Bulletin; *J. O.*, Journal Official (France); *L. N. M. S.*, League of Nations, Monthly Summary; *L. N. O. J.*, League of Nations, Official Journal; *L. N. Q. B.*, League of Nations, Quarterly Bulletin; *L. N. T. S.*, League of Nations, Treaty Series; *P. A. U.*, Pan American Union Bulletin; *Press notice*, U. S. State Dept. press notice; *R. D. I.* (Paris), Revue de Droit International, (Paris); *R. D. I.* (Geneva), Revue de Droit International (Geneva); *R. G. D. I. P.*, Revue Générale de Droit International Public; *R. D. I. P.*, Revue de Droit International Privé; *R. J. I. L. A.*, Revue Juridique International de la Locomotion Aérienne; *R. R.*, American Review of Reviews; *U. S. C. R.*, U. S. Commerce reports.

March, 1927

20 AUSTRIA—SWEDEN. Exchanged ratifications of treaty of conciliation and arbitration, signed May 28, 1926. Text: *R. G. D. I. P.*, Sept.–Oct., 1927, p. 664.

23 POLAND—SWEDEN. Exchanged ratifications of treaty of conciliation and arbitration, signed Nov. 3, 1925. Text: *R. G. D. I. P.*, Sept.–Oct., 1927, p. 668.

April, 1927

5 HUNGARY—ITALY. Signed treaty of friendship. Text: *R. D. I.* (*Paris*), April–June, 1927, p. 515.

10 AFGHANISTAN—RUSSIA. Neutrality and mutual non-aggression pact, signed Aug. 31, 1926, was ratified. *Soviet Union R.*, June, 1927, p. 100.

24 GREAT BRITAIN—SPAIN. Commercial convention granting most-favored-nation treatment to products of British India entering ports of Spain and those of Spain entering ports of British India, came into force. *U. S. C. R.*, Oct. 24, 1927, p. 24

May, 1927

26–31 INTERNATIONAL FEDERATION OF LEAGUE OF NATIONS SOCIETIES. Held congress at Berlin. *R. D. I.* (*Paris*), Apr.–June, 1927, p. 603.

28 CHILE—SPAIN. Signed arbitration treaty to last ten years. *Esprit Int.*, Oct., 1927, p. 534.

30 *to* June 2 WIRELESS TELEGRAPH CONGRESS. Second international juridical conference held at Geneva. Resolutions. *R. D. I.* (*Paris*), Apr.–June, 1927, p. 591.

June, 1927

6 HAITI—FRANCE. Exchanged ratifications of commercial agreement signed July 29, 1926, which is to continue in operation until July 29, 1929. *P. A. U.*, Dec., 1927, p. 1251.

10 INTERNATIONAL DIPLOMATIC ACADEMY. *L'Academie Diplomatique Internationale* was organized in Paris. *Temps*, June 16, 1927, p. 5. (*Its* Séances et travaux, 1927.) Appointed a committee to study plans for codification of international law. *Temps*, Nov. 10, 1927, p. 4.

28–30 GREECE—SPAIN. Provisional commercial convention arranged by exchange of notes. *U. S. C. R.*, Oct. 10, 1927, p. 119.

29 FRANCE—SIAM. Exchanged ratifications of convention signed at Bangkok, Aug. 25, 1926, concerning reports of Siam and French Indo-China. Text: *J. O.*, Sept. 24, 1927, p. 10006.

30 *to* Sept. 21 FRANCO-RUSSIAN DEBT. Notes exchanged between Soviet and French delegations at the Franco-Soviet conference, including Soviet proposals regarding debts of former Russian Government. Texts: *E. E. P. S.*, Sept. 30, 1927.

July, 1927

1 SPAIN—TURKEY. Temporary commercial treaty extended for six months. *U. S. C. R.*, Oct. 3, 1927, p. 55.

9 BELGIUM—PORTUGAL. Signed treaty of conciliation and arbitration. *Paix par le droit*, Aug–Sept., 1927, p. 303.

14–19 BELGIUM—GERMANY. Exchanged notes concerning obligations of Germany respecting disarmament. Text: *R. G. D. I. P.*, Sept.–Oct., 1927, p. 649.

18–23 PAN AMERICAN LABOR CONGRESS. Fifth congress held in Washington. *U. S. Monthly Labor R.*, Sept., 1927, p. 90.

23 BRAZIL—PERU. Exchanged ratifications of compulsory arbitration convention, signed at Rio de Janeiro on July 11, 1918. *P. A. U.*, Nov., 1927, p. 1141.

26 AUSTRIA—LATVIA. Exchanged ratifications of most-favored-nation commercial treaty, signed Aug. 9, 1924. *U. S. C. R.*, Oct. 3, 1927, p. 55.

26 GREAT BRITAIN—HUNGARY. Exchanged ratifications of most-favored-nation commercial treaty, signed July 23, 1926. *U. S. C. R.*, Oct. 3, 1927, p. 55.

31 CZECHOSLOVAKIA—FINLAND. Most-favored-nation commercial treaty signed Mar. 2, 1927, came into force. *U. S. C. R.*, Sept. 26, 1927, p. 827.

August, 1927

1–5 INTERNATIONAL MARITIME COMMITTEE. Held 16th conference at Amsterdam for consideration of compulsory insurance of passengers, letters of guaranty, etc. *B. I. I. I.*, Oct., 1927, p. 289. *R. D. I. P.*, 1927, p. 632.

1 POSTAL TRANSFER OFFICE. Opened in Panama City, in accordance with Pan American Postal Convention signed in Mexico City, July, 1926. Service of this office, which will receive and forward to its place of destination the mail of parties signatory to the convention, has been accepted by Argentine, Chile, Ecuador, Cuba, Guatemala, Salvador and Colombia. *P. A. U.*, Oct., 1927, p. 1040.

4 SPAIN—SWITZERLAND. By a reciprocal declaration, Switzerland was granted most-favored-nation treatment in Morocco. *U. S. C. R.*, Nov. 14, 1927, p. 439.

10 NATIONALITY IN FRANCE. Law of Aug. 10, 1927, promulgated in France. Text: *B. I. I. I.*, Oct., 1927, p. 418. *Clunet*, July–Oct., 1927, p. 1213. *J. O.*, Aug. 14, 1927, p. 8697.

16 TRADE MARK OFFICE. In accordance with Art. IX of Trade-mark convention of April 28, 1923, the President of Brazil issued decree establishing Inter-American Office of Patents and Trade-marks in Rio de Janeiro, the convention having been ratified by six of the 18 signatory nations. *P. A. U.*, Dec., 1927, p. 1251. *D. O.* (Brazil), Aug. 18, 1927.

17 FRANCE—GERMANY. Most-favored-nation commercial treaty initialed at Paris. *Times*, Aug. 18, 1927, p. 9. *N. Y. Times*, Aug. 18, 1927, p. 6. *E. E. P. S.*, Aug. 31, 1927. Came into force on Sept. 6. Text: *J. O.*, Aug. 31, 1927, p. 9203. *Europe*, Sept. 17, 1927, p. 1231.

22–25 EUROPEAN MINORITIES CONGRESS. Third congress held at Geneva. *Paix par le droit*, Oct., 1927, p. 368.

22 MILITARY CONTROL IN HUNGARY. After considering report of Interallied Commission of Control on fulfillment by Hungary of military clauses of Treaty of Trianon, the Conference of Ambassadors notified Council of League of Nations and Hungarian Government of its decision to bring work of commission to a close. *Times*, (London), Aug. 23, 1927, p. 9.

24 *to* Sept. 2. INSTITUTE OF INTERNATIONAL LAW. Held 35th session at Lausanne, under presidency of Dr. James Brown Scott. *R. D. I.* (*Geneva*), July–Sept., 1927, pp. 220 and 230. *Esprit*, Oct., 1927, p. 543. *N. Y. Times*, Sept. 20, 1927, p. 18.

24–29 PRESS EXPERTS CONFERENCE. Conference of Press Experts, convened by Council of League of Nations, met at Geneva, attended by representatives of 38 countries. Final resolutions: *L. N. M. S.*, Sept. 15, 1927, p. 252. *U. S. Daily*, Aug. 30, 1927, p. 2. *Times* (London), Aug. 30, 1927, p. 9.

25–30 INTERPARLIAMENTARY UNION. Held 24th conference in Paris to discuss Rhineland occupation, reduction of armaments, tariff walls, codification of international law, etc. *Times* (London), Aug. 26–31, 1927, p. 9. *Interparliamentary bulletin*, July–Aug., 1927, p. 132. Resolutions: *Circular to Groups*, no. 12 (1927).

26 HUNGARY—TURKEY. Exchanged ratifications of most-favored-nation commercial treaty, signed Dec. 20, 1926. *U. S. C. R.*, Dec. 5, 1927, p. 631.

29 BELGIUM—TURKEY. Signed commercial treaty at Angora. *Temps*, Aug. 30, 1927, p. 1.

29 FRANCE—UNITED STATES. Signed agreement for acquisition of sites for monuments which the American Battle Monuments Commission is to erect in France. *U. S. Treaty Series*, no. 757.

30 FRANCE—JAPAN. Signed protocol at Paris concerning economic reports between Indo-China and Japan. Text: *J. O.*, Sept. 18, 1927, p. 9879.

30 NORWAY—POLAND. Exchanged ratifications of most-favored-nation commercial treaty, signed Dec. 22, 1926. *U. S. C. R.*, Oct. 17, 1927, p. 182.

31 BOLIVIA—GERMANY. Exchanged ratifications of most-favored-nation commercial treaty of Mar. 12, 1924. *U. S. C. R.*, Nov. 14, 1927, p. 439.

September, 1927

1 AIR MAIL CONFERENCE. Opened at The Hague, under auspices of Universal Postal Union, with 35 countries represented. Various regulations were passed, which will go into effect Jan. 1, 1928. *B. I. N.*, Sept. 17, 1927, p. 23.

Sept. 1–28 LEAGUE OF NATIONS COUNCIL. Held 46th session, Sept. 1–15 and 47th session Sept. 17–28. Considered Rumanian-Hungarian controversy over rights of Hungarian property owners in territories transferred under Treaty of Trianon from Hungary to Rumania, and competence of Rumanian-Hungarian Arbitral Tribunal to decide it; work of Preparatory Commission for Disarmament Conference; appointment of five jurists for first conference on codification of international law to be held at The Hague in 1929. *L. N. O. J.*, Oct., 1927. On Sept. 15, the eighth Assembly elected Cuba, Finland and Canada to serve on Council for three years, the retiring members being Belgium, Salvador and Czechoslovakia. *L. N. M. S.*, Oct. 15, 1927, p. 277.

1 *to* Nov. 5 GERMAN REPARATIONS. Fourth year of Dawes plan began on Sept. 1. Summary of Agent-General's report: *Times* (London), Sept. 2, 1927, p. 11. S. Parker Gilbert, Agent General of Reparations, addressed warning to German Government on Oct. 20 against its mounting expenses, as a menace to the equilibrium of the budget. Text: *Times* (London), Nov. 7, 1927, p. 8. Economic policy defended

in Finance Minister Köhler's reply of Nov. 5. Summary: *Times* (London), Nov. 7, 1927. *Cur. Hist.*, Dec., 1927, *27:* 431. Text: *E. E. P. S.*, Nov. 15, 1927.

2 GERMANY—ITALY. Signed treaty at Rome to regulate certain questions concerning Arts. 296 and 297 of Versailles Treaty. *Temps*, Sept. 4, 1927, p. 1.

3 BELGIUM—FRANCE. Exchanged ratifications of additional agreement to arrangement of Oct. 9, 1919, for reparation of war damages, signed Dec. 14, 1923. Text: *J. O.*, Sept. 27, 1927, p. 10086.

5–27 LEAGUE OF NATIONS ASSEMBLY. At eighth ordinary session, all member states were represented except Argentina, Bolivia, Brazil, Honduras, Peru and Spain. Principal results: Declaration on aggressive war as an international crime; continuation of work in connection with arbitration, security and reduction of armaments; arrangement for convocation by League of first conference for the codification of international law in 1929; creation of new advisory economic committee; coöperation in financial reform of Greece and Bulgaria; opening of a convention for execution of foreign arbitral awards; creation of a League educational information center. Resolutions: *L. N. M. S.*, Oct. 15, 1927. *Jour. of Eighth Assembly*, Sept. 5–27, 1927.

6–Nov. 16 FRANCE—UNITED STATES. New French tariff act came into force on Sept. 6, creating a new situation for American goods. On Sept. 12, American Embassy delivered draft of proposed commercial treaty to French Foreign Office, and exchange of notes of Sept. 14, 19, and 30 took place. *U. S. Daily*, Oct. 4, 1927. *N. Y. Times*, Oct. 4, 1927, p. 18. New notes exchanged Oct. 10, 15 and 22 and Nov. 2 and 7. On Nov. 16, cablegram received in Department of Commerce to effect that French discriminatory tariff against imports of certain goods of the United States, will be removed by the French Government on Nov. 21. Text: *U. S. Daily*, Nov. 17, 1927, p. 1. *U. S. C. R.*, Nov. 28, 1927, p. 568.

7 *to* Oct. 18 PERMANENT COURT OF INTERNATIONAL JUSTICE. On Sept. 7 the court amended Art. 71 of its rules concerning advisory opinions, and on same day gave its judgment in favor of Turkey in dispute between France and Turkey in the *Lotus* case, holding that Turkey's action was not contrary to principles of international law. *L. N. M. S.*, Oct. 15, 1927, p. 266. Judgments of the Court, Ser. A, no. 10 *Clunet*, July–Oct., 1927, p. 1003. On Oct. 10, the court gave its judgment in Mavrommatis concessions (readaptation) case, recognizing as well funded the plea to jurisdiction of the court made by British Government, and consequently ruled that it had no jurisdiction to entertain, upon its merits, suit brought by Greece against Great Britain in her capacity as mandatory for Palestine. From Oct. 6–13, the court held series of thirteen public sittings on jurisdiction of European Commission of the Danube submitted by the Council for an advisory opinion. On Oct. 11 the president of the court was asked to give assent to a clause inserted in a conciliation convention between Sweden and Colombia on Sept. 13, 1927, regarding choice of commissioners. On Oct. 18, German Government filed application asking court for authoritative interpretation of meaning and scope of its Judgments nos. 7 and 8 relating to taking over by Polish Government of nitrate factory at Chorzow. *L. N. M. S.*, Nov. 15, 1927.

8 GREAT BRITAIN—SPAIN. Exchanged notes concerning proof marks on firearms. *U. S. C. R.*, Nov. 14, 1927, p. 439.

9 BULGARIA—GREECE. Signed railway agreement. *B. I. N.*, Sept. 17, 1927, p. 11.

10 BELGIUM—PORTUGAL. Signed convention respecting frontier and other matters in connection with the Belgian Congo and Angola. *Times* (London), Sept. 12, 1927, p. 11.

15 GUATEMALA—ITALY. Most-favored-nation commercial treaty signed at Guatemala City. *U. S. C. R.*, Dec. 12, 1927, p. 698.

17 GREAT BRITAIN—HEJAZ-NEJD. Ratifications exchanged at Jeddah on Sept. 17 of treaty of friendship, signed May 20 on behalf of Great Britain and on behalf of the Hejaz and of Nejd. Notes exchanged May 19–21 relating to Hejaz-Transjordan frontier and slavery. Text: *G. B. Treaty Series*, no. 25, 1927. *Cmd.* 2951. *E. E. P. S.*, Sept. 30, 1927, p. 49.

18 GERMAN WAR GUILT. President Hindenburg, in speech at dedication of memorial of Battle of Tannenberg, repudiated German responsibility for the war. Text in part: *Times* (London), Sept. 19, 1927, p. 12.

23 IRAQ BOUNDARY COMMISSION. Met at Mosul on March 19, 1926, and signed reports on delimitation of boundary between Turkey and Iraq on Sept. 23, 1927. *Times* (London), Nov. 18, 1927, p. 15.

23 RUSSIA—UNITED STATES. Statement issued by Department of State that relations as outlined in Secretary Hughes' statement of Dec. 18, 1923, remain unchanged. *U. S. Daily*, Sept. 24, 1927, p. 1.

30 *to Oct. 4* RADIOTELEGRAPH CONFERENCE. Convention opened on Oct. 4, with official representatives of practically all nations of the world employing radio communication. Herbert Hoover elected president. *U. S. Daily*, Oct. 5, 1927. Exchange of notes between France and the United States outlining subjects to be discussed, made public by Department of State. *U. S. Daily*, Sept. 30, and Oct. 1, 1927. Outline of program: *U. S. Daily*, Oct. 3, 1927, p. 1.

October, 1927

1–9 FRANCE—RUSSIA. Exchanged notes relative to recall of Rakovsky, Soviet ambassador to France. Summary: *Times* (London), Oct. 10, 1927, p. 14. Texts: *E. E. P. S.*, Oct. 15, 1927, p. 81. *Europe*, Oct. 8, 1927, p. 1351.

1 GREAT BRITAIN—UNITED STATES. Checks totaling about $250,000 were exchanged at State Department in settlement of awards rendered on behalf of American and British claimaints by the arbitral tribunal established under convention of Aug. 18, 1910. *U. S. Daily*, Oct. 3, 1927, p. 3. *Press notice*, Oct. 1, 1927.

1 PERSIA—RUSSIA. Signed five agreements in Moscow. (1) Pact of guarantee and neutrality. Text: *Europe*, Oct. 29, 1927, p. 1457. (2) Agreement concerning fisheries in Caspian Sea. (3) Customs convention based on principle of reciprocal most-favored-treatment. (4) Exchange of notes concerning port of Pekhlevi. (5) Exchange of notes regarding trade relations. *E. E. P. S.*, Oct. 15, 1927, p. 67.

6 GERMANY—SERBIA. Commercial treaty signed. *U. S. C. R.*, Oct. 17, 1927, p. 182.

8 DENMARK—GERMANY. Arrangement made by exchange of notes for reduction of customs duties on certain Danish products. *U. S. C. R.*, Nov. 28, 1927, p. 568,

8 RUSSIA—SWEDEN. Commercial treaty and final protocol signed. Text: *E. E. P. S.*, Nov. 15, 1927, p. 162.

10–24 CONSULAR PROCEDURE. Pan American Conference on Simplification of Consular Procedure opened in Washington on Oct. 10 and closed Oct. 24, after adopting 18 resolutions signed by delegates from 21 republics of North, Central and South America. *U. S. Daily*, Oct. 11, 24–25, 1927.

10–13 COUNTERFEIT CURRENCY. Joint committee appointed by the League Council to study problems of eradicating offence of counterfeiting currency, examined draft convention drawn up at its first session. Summary of convention: *L. N. M. S.*, Nov. 15, 1927.

11 CZECHOSLOVAKIA—TURKEY. Provisional most-favored-nation agreement, concluded April 11, 1926, expired on Oct. 11 but was renewed for six months. *U. S. C. R.*, Dec. 5, 1927, p. 631.

12 CZECHOSLOVAKIA—POLAND. Delimitation Commission closed its work with the signing of agreements fixing the frontier. *B. I. N.*, Oct. 29, 1927, p. 12.

12 MEXICO—UNITED STATES. Exchanged ratifications of convention signed at Washington on Aug. 16, 1927, extending the duration of the General Claims Commission for two years. Text: *U. S. Treaty Series*, no. 758.

12 PAN AMERICAN SANITARY CONFERENCE. Eighth Conference opened in Lima. *P. A. U.*, Nov., 1927, p. 1157.

12–31 TARIFF NOMENCLATURE. Committee of experts of the League drew up preliminary draft. Summary: *L. N. M. S.*, Nov. 15, 1927.

14 AËRIAL NAVIGATION TREATY. Governing Board of Pan American Union approved convention drawn up May, 1927, by Pan American Aviation Congress. Text of convention and text of statement of Pan American Union: *U. S. Daily*, May 5–9 and Oct. 15, 1927.

17 *to Nov. 7* TRADE RESTRICTIONS CONFERENCE. Diplomatic conference on import and export restrictions and prohibitions opened at Geneva on Oct. 17, with 34 states participating. Adopted convention, protocol and final act on Nov. 7. *Times* (London), Oct. 18 and Nov. 8, 1927, pp. 15 and 13. *N. Y. Times*, Nov. 8, 1927, p. 3. *L. N. M. S.*, Nov. 15, 1927. Text of convention: *Europe*, Nov. 26, 1927, p. 1579, 1582.

25 FRANCE—PARAGUAY. Agreement concerning military service signed at Asuncion on Aug. 30, 1927, promulgated in France. Text: *J. O.*, Nov. 23, 1927, p. 11930.

27 BELGIUM—FRANCE. Exchanged ratifications of convention respecting conditions of residence and business, signed Oct. 6, 1927. *Text: J. O.*, Nov. 9, 1927, p. 11270.

November, 1927

2 GREECE—SERBIA. Commercial treaty signed in Athens. *B. I. N.*, Nov. 12, 1927, p. 15.

3 AFGHANISTAN—TURKEY. Signed treaty of amity. *B. I. N.*, Nov. 12, 1927, p. 21.

3 CUBA—SPAIN. Commercial treaty of July 15, 1927, came into force. *B. I. N.*, Nov. 12, 1927, p. 12.

5 LATVIA—RUSSIA. Trade agreement of June 2, 1927, came into force. *U. S. C. R.*, Nov. 14, 1927, p. 439.

5 MOSUL OIL. Announced that five leading American companies will acquire 25 per cent interest in Turkish Petroleum Company, which is to exploit oil resources of Mosul region of Iraq. *N. Y. Times*, Nov. 5, 1927, p. 1. *F. P. A. N. B.* Nov. 11, 1927.

6 AFGHANISTAN—POLAND. Signed treaty of friendship at Warsaw. *B. I. N.*, Nov. 12, 1927, p. 19.

7 SPAIN—UNITED STATES. By exchange of notes present most-favored-nation treatment of products of either nation is continued indefinitely. *U. S. C. R.*, Nov. 21, 1927, p. 505.

8 LATVIA—RUSSIA. Signed arbitration agreement providing that all commercial and civil disputes may be settled by a court of arbitration. *U. S. Daily*, Nov. 9, 1927, p. 9.

11 FRANCE—SERBIA. Signed treaty of friendship and coöperation. *N. Y. Times*, Nov. 12, 1927, p. 3. *Europe*, Nov. 12, 1927, p. 1494. *Times* (London), Nov. 12, 1927, p. 13.

International Conventions

Aeronautical Agreement. Paris, Mar. 31, 1927.
Signatures: Great Britain, France, Italy, Japan, Bulgaria. *L. N. M. S.*, Oct. 15, 1927, p. 275.

Arbitration Clauses. Protocol. Geneva, Sept. 24, 1923.
Signature: Danzig. Aug. 5, 1927. *L. N. O. J.*, Sept., 1927, p. 1041.
Ratification: Norway. *L. N. M. S.*, Oct. 15, 1927, p. 275.

Central American Foreign Policy. San Salvador, May 25, 1927.
Ratification: Salvador. July 18, 1927. *P. A. U.*, Nov., 1927, p. 1141.

Customs Formalities. Geneva, Nov. 3, 1926.
Ratification: Luxemburg. June 10, 1927. *L. N. O. J.*, Aug., 1927, p. 964.

German Peace Treaty. Versailles, June 28, 1919.
Amendments to Art. 393. Geneva, Nov. 2, 1922.
Ratification: Greece. June 8, 1927. *L. N. O. J.*, Aug., 1927, p. 964.

Inspection of Emigrants. Geneva, June 5, 1926.
Ratification: Netherlands. June 30, 1927. *I. L. O. M. S.*, Sept., 1927.

League of Nations Covenant. Protocol of Amendments.
Geneva, Oct. 5, 1921.
Signature: Chile (Art. 4, Council; Art. 6, Secretariat: Art. 12, 13, 15, Arbitration and Judicial Settlement) *L. N. M. S.*, Oct. 15, 1927, p. 276.

Maritime Ports. Convention and Statute. Geneva, Dec. 9, 1923.
Ratification: Sweden. *L. N. M. S.*, Oct. 15, 1927, p. 276.

Measurement of Vessels. Paris, Nov. 27, 1925.
Ratifications:
Austria. July 4, 1927.
Belgium, Bulgaria, France, Germany, Netherlands, Switzerland. July 2, 1927.
Great Britain and Northern Ireland. June 14, 1927.
Spain. July 11, 1927. *L. N. O. J.*, Aug., 1927, p. 963.

Navigable Waterways and Protocol. Barcelona, April 20, 1921.
Ratification: Sweden. *L. N. M. S.*, Oct. 15, 1927, p. 276.

Obscene Publications. Geneva, Sept. 12, 1923.
Ratifications:
Luxemburg. Aug. 10, 1927. *L. N. O. J.*, Sept., 1927, p. 1041.
Netherlands (including Dutch East Indies, Surinam and Curaçao), *L. N. M. S.*, Oct. 15, 1927, p. 276.
Portugal. *L. N. M. S.*, Nov. 15, 1927.

Opium Convention. Geneva, Feb. 19, 1925.
Ratifications:
France. July 2, 1927.
Poland and Danzig. June 16, 1927. *L. N. O. J.*, Aug., 1927, p. 963.

Permanent Court of International Justice. Optional Clause. Geneva, Dec. 16, 1920.
Signature: Germany. Sept. 23, 1927. *L. N. M. S.*, Oct. 15, 1927, p. 270. *Jour. of Eighth Assembly*, Sept. 24, 1927, p. 295.

Postal Convention and Protocol. Mexico, Nov. 9, 1927.
Ratification: Salvador. Aug. 15, 1927. *P. A. U.*, Dec., 1927, p. 1252.

Railways Régime. Convention and Statute. Geneva, Dec. 9, 1923.
Ratification: Sweden. *L. N. M. S.*, Oct. 15, 1927, p. 276.

RELIEF UNION. Geneva, July 12, 1927.
Signatures and text:
Germany, Belgium, Bulgaria, Colombia, Cuba, Danzig, Ecuador, Spain, Guatemala, Italy, Monaco, Poland, Uruguay. *L. N. O. J.*, Aug., 1927, p. 997.

SLAVERY CONVENTION. Geneva, Sept. 25, 1927.
Adhesions:
Haiti and Nicaragua. *L. N. M. S.*, Oct. 15 and Nov. 15, 1927.
Ratifications:
Austria. Aug. 19, 1927. *L. N. O. J.*, Sept., 1927, p. 1041.
Great Britain, India and Dominions (except Canada and Irish Free State), June 18, 1927.
Latvia. July 9, 1927. *L. N. O. J.*, Aug., 1927, p. 963.
Norway and Spain. *L. N. M. S.*, Oct. 15, 1927, p. 275.
Portugal. *L. N. M. S.*, Nov. 15, 1927.

TRAFFIC REGULATION. Paris, April 24, 1926.
Ratification: Tunis. July 28, 1927. *J. O.*, Nov. 5, 1927. p. 11270.

WINE BUREAU. Paris, Nov. 29, 1924.
Ratifications deposited:
France. June 21, 1927.
Spain. Dec. 31, 1926.
Portugal. July 29, 1927.
Tunis. May 12, 1927.
Hungary. Oct. 29, 1927. *J. O.*, Nov. 9, 1927, p. 11382.

WORKMEN'S COMPENSATION FOR ACCIDENTS. Geneva, June 10, 1925.
Ratification: Netherlands. June 30, 1927. *I. L. O. M. S.*, Sept., 1927.

WORKMEN'S COMPENSATION FOR ACCIDENTS (Equality of Treatment) Geneva, June 5, 1925.
Ratification: Netherlands. June 30, 1927. *I. L. O. M. S.*, Sept., 1927.

M. ALICE MATTHEWS.

JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW

SUPREME COURT OF THE UNITED STATES

LUTHER WEEDIN, Commissioner of Immigration at Seattle, *v.* CHIN BOW

June 6, 1927

Citizenship of children born outside the United States whose fathers were citizens of the United States; "but the rights of citizenship shall not descend to the children whose fathers never resided in the United States" (R. S. 1993) construed.

"The expression 'the rights of citizenship shall descend' can not refer to the time of the death of the father, because that is hardly the time when they do descend. The phrase is borrowed from the law of property. The descent of property comes only after the death of the ancestor. The transmission of right of citizenship is not at the death of the ancestor but at the birth of the child, and it seems to us more natural to infer that the conditions of the descent contained in the limiting proviso, so far as the father is concerned, must be perfected and have been performed at that time."

Mr. Chief Justice TAFT delivered the opinion of the court.

This is a writ of certiorari to review a judgment of the United States Circuit Court of Appeals for the Ninth Circuit affirming an order of the District Court for the Western District of Washington allowing a writ of habeas corpus for Chin Bow, a Chinese boy ten years of age, and granting him a discharge. The petition for certiorari was filed October 29, 1925, and granted December 7, 1925, 269 U. S. 550, under section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936.

Chin Bow applied for admission to the United States at Seattle. The board of special inquiry of the Immigration Bureau at that place denied him admission on the ground that though his father is a citizen, he is not a citizen, because at the time of his birth in China his father had never resided in the United States. Chin Bow was born March 29, 1914, in China. His father, Chin Dun, was also born in China on March 8, 1894, and had never been in this country until July 18, 1922. Chin Dun was the son of Chin Tong, the respondent's grandfather. Chin Tong is forty-nine years old and was born in the United States.

The Secretary of Labor affirmed the decision of the Board of Inquiry, and the deportation of the respondent was ordered. He secured a writ of habeas corpus from the District Court. Upon a hearing, an order discharging him was entered without an opinion. On appeal by the United States, the Circuit Court of Appeals affirmed the judgment of the District Court, 7 Fed. (2nd), 369, holding him to be a citizen under the provisions of Section 1993 of the Revised Statutes, which is as follows:

> All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States.

The rights of Chin Bow are determined by the construction of this section. The Secretary of Labor, April 27, 1916, asked the opinion of Attorney General Gregory whether a rule of the Chinese regulations of his Department, which denied citizenship to foreign-born children of American Chinese, was a valid one. He advised that it was not, because Section 1993 applied to all children and therefore included Chinese children as well. The second question was whether foreign-born children of American-born Chinese fathers were entitled to enter the United States as citizens thereof, when they had continued to reside for some time in China after reaching their majorities, without any affirmative action on their part indicating an intention to remain citizens of the United States, and the Attorney General advised that they were, in spite of these circumstances, entitled to enter the United States as citizens thereof, 30 Op. A. G. 529.

The United States contends that the proviso of Sec. 1993 "but the rights of citizenship shall not descend to children whose fathers never resided in the United States" must be construed to mean that only the children whose fathers have resided in the United States before their birth become citizens under the section. It is claimed for the respondent that the residence of the father at any time in the United States before his death entitles his son whenever born to citizenship. These conflicting claims make the issue to be decided.

The very learned and useful opinion of Mr. Justice Gray speaking for the court in United States *v.* Wong Kim Ark, 169 U. S. 649, establishes that at common law in England and the United States the rule with respect to nationality was that of the *jus soli*, that birth within the limits of the jurisdiction of the Crown and of the United States, as the successor of the Crown, fixed nationality, and that there could be no change in this rule of law except by statute; that by the statute of 7 Anne, (1708) c. 5, sec. 3, extended by the statute of 4 George II, (1731) c. 21, all children born out of the ligeance of the Crown of England whose fathers were or should be natural-born subjects of the Crown of England, or of Great Britain, at the time of the birth of such children respectively were deemed natural-born subjects of that kingdom to all intents and purposes whatsoever. That statute was extended by the statute of 13 George III, (1773) c. 21, to foreign-born grand-children of natural-born subjects but not to the issue of such grand-children (169 U. S. 671). De Geer *v.* Stone, 22 Ch. D. 243, 252; Dicey, Conflict of Laws, 178, 781. The latter author says (p. 782) that British nationality did not pass by descent or inheritance beyond the second generation. These statutes applied to the colonies before the War of Independence.

The Act of March 26, 1790, entitled "An Act to establish an uniform Rule of Naturalization," 1 Stat. 103, c. 3, came under discussion in February, 1790, in the House, but the discussion was chiefly directed to naturalization and not to the status of children of American citizens born abroad. Annals

of First Congress, 1109, 1110, *et seq.* The only reference is made by Mr. Burke (p. 1121) in which he says:

> The case of the children of American parents born abroad ought to be provided for, as was done in the case of English parents in the 12th year of William III. There are several other cases that ought to be likewise attended to.

Mr. Hartley said (p. 1125) that he had another clause ready to present providing for the children of American citizens born out of the United States. A select committee of ten was then appointed to which the bill was recommitted and from which it was reported. But no subsequent reference to the provision of the bill which we are now considering appears. The bill as passed was as follows:

> An Act to establish an uniform Rule of Naturalization.
>
> Sec. 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any alien, being a free white person, who shall have resided within the limits and under the jurisdiction of the United States for the term of two years, may be admitted to become a citizen thereof, on application to any common law court of record, in any one of the states wherein he shall have resided for the term of one year at least, and making proof to the satisfaction of such court, that he is a person of good character, and taking the oath or affirmation prescribed by law, to support the constitution of the United States, which oath or affirmation such court shall administer; and the clerk of such court shall record such application, and the proceedings thereon; and thereupon such person shall be considered as a citizen of the United States. And the children of such persons so naturalized, dwelling within the United States, being under the age of twenty-one years at the time of such naturalization, shall also be considered as citizens of the United States. And the children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural-born citizens: Provided, That the right of citizenship shall not descend to persons whose fathers have never been resident in the United States: Provided also, That no person heretofore proscribed by any state, shall be admitted a citizen as aforesaid, except by an act of the legislature of the state in which such person was proscribed.

This act was repealed by the Act of January 29, 1795, 1 Stat. 415, Section 4, but the third section of that Act reënacted the provisions of the Act of 1790 as to children of citizens born beyond the sea, in equivalent terms. The clauses were not repealed by the next Naturalization Act of June 18, 1798, 1 Stat. 566, but continued in force until the 14th of April, 1802, when an act of Congress of that date, 2 Stat. 153, repealed all preceding acts respecting naturalization. After its provision as to naturalization, it contained in its fourth section the following:

> That the children of persons duly naturalized under any of the laws of the United States, or who, previous to the passing of any law on that

> subject by the government of the United States, may have become citizens of any one of the said states, under the laws thereof, being under the age of twenty-one years at the time of their parents being so naturalized or admitted to the rights of citizenship, shall, if dwelling in the United States, be considered as citizens of the United States, and the children of persons who now are or have been citizens of the United States shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States: Provided, That the right of citizenship shall not descend to persons whose fathers have never resided within the United States.

No change was made in the law until 1855. Mr. Horace Binney had written an article, which he published December 1, 1853, for the satisfaction of fellow citizens and friends, whose children were born abroad during occasional visits by their parents to Europe. 169 U. S. 665, 2 Amer. Law Reg. 193. He began the article as follows:

> It does not, probably, occur to the American families who are visiting Europe in great numbers, and remaining there, frequently, for a year or more, that all their children born in a foreign country are aliens, and when they return home, will return under all the disabilities of aliens. Yet this is indisputably the case; for it is not worth while to consider the only exception to this rule that exists under the laws of the United States, viz., the case of a child so born, whose parents were citizens of the United States on or before the 14th day of April, 1802.
>
> It has been thought expedient, therefore, to call the attention of the public to this state of the laws of the United States that if there are not some better political reasons for permitting the law so to remain than the writer is able to imagine, the subject may be noticed in Congress and a remedy provided.

Mr. Binney demonstrates that under the law then existing, the children of citizens of the United States born abroad, and whose parents were not citizens of the United States on or before the 14th of April, 1802, were aliens, because the Act of 1802 only applied to such parents, and because under the common law which applied in this country, the children of citizens born abroad were not citizens but were aliens. Mr. Binney was not interested in the citizenship of the second generation of children of citizens of the United States born abroad, and nothing in this article was directed to the question of the meaning of the words contained in the Act of 1802, "Provided that the right of citizenship shall not descend to persons whose fathers have never resided within the United States."

The Act of February 10, 1855 (10 Stat. 604), passed presumably because of Mr. Binney's suggestion, was entitled "An Act to secure the right of citizenship to children of citizens of the United States born out of the limits thereof," and read as follows:

> That persons heretofore born, or hereafter to be born, out of the limits and jurisdiction of the United States whose fathers were or shall be at the time of their birth citizens of the United States, shall be

deemed and considered and are hereby declared to be citizens of the United States: Provided, however, That the rights of citizenship shall not descend to persons whose fathers never resided in the United States.

Sec. 2. That any woman who might lawfully be naturalized under the existing laws, married, or who shall be married to a citizen of the United States, shall be deemed and taken to be a citizen.

The part of the Act of 1855 we are interested in was embodied in the Revised Statutes as Section 1993.

It is very clear that the proviso in Section 1993 has the same meaning as that which Congress intended to give it in the Act of 1790, except that it was then retrospective as it was in the Act of 1802, while in the Act of 1855 it was intended to be made prospective as well as retrospective. What was the source of the peculiar words of the proviso there seems to be no way of finding out, as the report of the discussion of the subject is not contained in any publication brought to our attention. It is evident, however, from the discussion in the First Congress, already referred to, that there was strong feeling in favor of the encouragement of naturalization. There were some Congressmen, although they did not prevail, who were in favor of naturalization by the mere application and taking of the oath. The time required for residence to obtain naturalization was finally limited to two years. In the Act of 1795 this was increased to five years, with three years for declaration of intention, just as it is now. Congress must have thought that the questions of naturalization and of the conferring of citizenship on sons of American citizens born abroad were related.

Congress had before it the Act of George III of 1773 which conferred British nationality not only on the children but also on the grandchildren of British-born citizens who were born abroad. Congress was not willing to make so liberal a provision. It was natural that it should wish to restrict the English provision because at the time that this phrase was adopted there were doubtless many foreign-born children of persons who were citizens of the seceding colonies with respect to whose fathers there was a natural doubt whether they intended to claim or enjoy American citizenship or indeed were entitled to it. The last provision of the Act of 1790 manifested this disposition to exclude from the operation of the act those who were citizens or subjects in the States during the Revolution and had been proscribed by their legislatures. It is not too much to say, therefore, that Congress at that time attached more importance to actual residence in the United States as indicating a basis for citizenship than it did to descent from those who had been born citizens of the colonies or of the States before the Constitution. As said by Mr. Fish, when Secretary of State, to Minister Washburn, June 28, 1873, in speaking of this very proviso, "the heritable blood of citizenship was thus associated unmistakably with residence within the country which was thus recognized as essential to full citizenship." Foreign Relations of

the United States, Pt. 1, 1873, page 259. It is in such an atmosphere that we are to interpret the meaning of this peculiarly worded proviso.

Only two constructions seem to us possible and we must adopt one or the other. The one is that the descent of citizenship shall be regarded as taking place at the birth of the person to whom it is to be transmitted and that the words "have never been resident in the United States" refer in point of time to the birth of the person to whom the citizenship is to descend. This is the adoption of the rule of *jus sanguinis* in respect to citizenship and that emphasizes the fact and time of birth as the basis of it. We think the words "the right of citizenship shall not descend to persons whose fathers have never been resident in the United States" are equivalent to saying that fathers may not have the power of transmitting by descent the right of citizenship until they shall become residents in the United States. The other view is that the words "have never been resident in the United States" have reference to the whole life of the father until his death, and therefore that grandchildren of native-born citizens even after they, having been born abroad, have lived abroad to middle age and without residing at all in the United States, will become citizens, if their fathers born abroad and living until old age abroad shall adopt a residence in the United States just before death. We are thus to have two generations of citizens who have been born abroad, lived abroad, the first coming to old age and the second to maturity and bringing up of a family without any relation to the United States at all until the father shall in his last days adopt a new residence. We do not think that such a construction accords with the probable attitude of Congress at the time of the adoption of this proviso into the statute. Its construction extends citizenship to a generation whose birth, minority and majority, whose education and whose family life have all been out of the United States and naturally within the civilization and environment of an alien country. The beneficiaries would have evaded the duties and responsibilities of American citizenship. They might be persons likely to become public charges or afflicted with disease, yet they would be entitled to enter as citizens of the United States. Van Dyne, Citizenship of the United States, p. 34.

As between the two interpretations, we feel confident that the first one was more in accord with the views of the First Congress. We think that the proviso has been so construed by a subsequent Act of Congress of March 2, 1907, c. 2534, section 6, 34 Stat., 1229, which provides:

> That all children born outside the limits of the United States who are citizens thereof in accordance with the provisions of section 1993 of the Revised Statutes of the United States, and who continue to reside outside the United States shall, in order to receive the protection of this Government, be required upon reaching the age of eighteen years to record at an American consulate their intention to become residents and remain citizens of the United States, and shall be further required to take the oath of allegiance to the United States upon attaining their majority.

Now if this Congress had construed Section 1993 to permit the residence prescribed to occur after the birth of such children, we think that it would have employed appropriate words to express such meaning, as for example "All children born who are or may become citizens." The present tense is used, however, indicating that citizenship is determined at the time of birth. Moreover, such foreign-born citizens are required upon reaching the age of eighteen years to record their intention to become residents and remain citizens of the United States and take the oath of allegiance to the United States upon attaining their majority. If the residence prescribed for the parent may occur after the birth of the children, the father may remain abroad and not reside in the United States until long after such children attain their majority. Thus they could not register or take the oath of allegiance because the rights of citizenship could not descend to them until their fathers had resided in the United States. This class of foreign-born children of American citizens could not, then, possibly comply with the provisions of the Act of 1907. Nor could such children "remain citizens" since they are expressly denied the rights of citizenship. We may treat the Act of 1907 as being *in pari materia* with the original act, and as a legislative declaration of what Congress in 1907 thought was its meaning in 1790. United States *v.* Freeman, 3 How. 556, 564, *et seq.*; Cope *v.* Cope, 137 U. S. 682, 688.

Counsel for the respondent insist that the Act of 1907 is not an act that reflects on the construction to be placed on Section 1993; that there is a distinction between citizenship and the enjoyment of it in this country on the one hand and the rules that should limit the protection of it abroad by our government on the other. This may well be conceded. It is illustrated in the opinion of Attorney General Hoar, 13 Op. A. G. 90, in which he advised that even if applicants were citizens they were not entitled to the protection of passports under the circumstances of that case. But we do not think that this distinction detracts from the argumentative weight of the Act of 1907 as a Congressional interpretation of the proviso of 1855, 1802 and 1790.

In answer to the reasons which influence us to the conclusion already indicated, counsel for the respondent say, first, that the hypothesis that the foreign-born fathers and sons may all live abroad from birth to middle age and bring up families without any association with the United States and that the sons may then become citizens by the ultimate residence of their fathers in the United States is not a possible one, because such children must have signified their intention to become citizens when they reached eighteen years of age or at majority at any rate. But these provisions with respect to election of citizenship by those coming to majority were not in the statute when the proviso was enacted, and we must construe it as of 1790 with reference to the views that Congress may be thought to have had at that time.

Then it is urged that the State Department has held that Section 1993 refers only to children and not to adults. This would be a narrow construc-

tion of the proviso as it was intended to operate in 1790 when the act was passed, and although this was suggested as a possible view by Secretary of State Bayard, it would limit too much the meaning of the word "children" at a time when no provision had been made by law for election of citizenship by those coming of age. Nor does it seem to be in accord with Attorney General Gregory's opinion already referred to. 35 Op. A. G. 529.

It is said that it would be illogical and unnatural to provide that the father having begotten children abroad before he lived in the United States at all, and then having gone to the United States and resided there and returned and had more children abroad, should have a family part aliens and part citizens. As this is entirely within the choice of the father, there would seem to be no reason why such a situation should be anomalous. As the father may exercise his option in accordance with the law, so citizenship will follow that option.

Counsel for the respondent in their learned and thorough brief have sought to sustain their conclusion in favor of the latitudinarian view of the proviso by many references, all of which we have examined. They point to the language of Mr. Justice Gray in delivering the majority opinion in United States *v.* Wong Kim Ark, 169 U. S. 649. The majority in that case, as already said, held that the fundamental principle of the common law with regard to nationality was birth within the allegiance of the government and that one born in the United States, although of a race and of a parentage denied naturalization under the law, was nevertheless under the language of the Fourteenth Amendment a citizen of the United States by virtue of the *jus soli* embodied in the amendment. The attitude of Chief Justice Fuller and Mr. Justice Harlan was that at common law the children of our citizens born abroad were always natural-born citizens from the standpoint of this government, and that to that extent the *jus sanguinis* obtained here; that the Fourteenth Amendment did not exclude from citizenship by birth children born in the United States of parents permanently located here who might themselves become citizens; nor on the other hand did it arbitrarily make citizens of children born in the United States of adults who according to the will of their native government and of this government are and must remain aliens. Section 1993 is referred to both in the majority opinion and in the minority opinion. Speaking of the Act of 1855 the majority opinion says (p. 674):

> It thus clearly appears that, during the half century intervening between 1802 and 1855, there was no legislation whatever for the citizenship of children born abroad, during that period, of American parents who had not become citizens of the United States before the act of 1802; and that the act of 1855, like every other act of Congress upon the subject, has, by express proviso, restricted the right of citizenship, thereby conferred upon foreign-born children of American citizens, to those children themselves, unless they became residents of the United States. Here is nothing to countenance the theory that a general rule of citizen-

> ship by blood or descent has displaced in this country the fundamental rule of citizenship by birth within its sovereignty.

The minority opinion said (p. 714):

> Section 1993 of the Revised Statutes provides, that children so born "are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States." Thus a limitation is prescribed on the passage of citizenship by descent beyond the second generation if then surrendered by permanent non-residence, and this was contained in all the acts from 1790 down.

It is very clear that the exact meaning of the proviso upon the point here at issue was not before the court. The section itself and the policy of the United States in the sections that preceded it were important in the discussion only in showing how restricted or otherwise was the application of the *jus sanguinis* in our law. There is nothing in the opinion of the court that contains an intimation as to what period is covered by the expression "never resided in the United States." We can not regard such a doubtful expression as that of Chief Justice Fuller in his dissent as authoritative in respect to the issue here.

Reference is then made to the very admirable opinion presented by Secretary Fish to President Grant, on July 27, 1868, of the legislation afterwards embodied in the Revised Statutes, Sections 1999, 2000 and 2001, in reference to the right of expatriation prompted by the Fenian and other international differences and intended to apply especially to the expatriation of persons coming from European countries to the United States and seeking and receiving naturalization in the United States. U. S. Foreign Relations, 1873, Pt. II, pp. 1191, 1192. President Grant solicited opinions from all of his Cabinet officers. That of Secretary Fish is relied on in this discussion. We do not find it specifically directed to the issue here. It is rather occupied in a consideration of the point which was then very much mooted, as to what constituted expatriation and what rules should be adopted in determining whether citizens or subjects of other countries coming to the United States were expatriated and whether after having been admitted to citizenship they lost their rights of citizenship by reason of a return to the country of their birth and a residence there. The only important reference to the proviso of Section 1993 is the suggestion by Secretary Fish that the proviso was a recognition by Congress of the right of foreign countries to fix for themselves what constituted allegiance to their country of persons living in their country without regard to the laws of this country extending citizenship of this country to such persons within their allegiance. Nor do we find anything more definite upon the meaning of the proviso in Section 1993 in the letter, already cited, of Secretary Fish to Mr. Washburn under date of June 28, 1873. Foreign Relations of the United States, 1873, Pt. I, p. 256. Reference is also made to the opinion of Attorney General Hoar, already cited,

which was rendered to Secretary Fish in a case that did not present this question at all. 13 Op. A. G. 90. The Secretary asked the Attorney General whether four persons residing in the Island of Curacao for whom application was made for passports were citizens of the United States and entitled as such to have passports issued to them. They were over twenty-one years of age, and were born in the islands of Curacao. Four of them were children of native citizens of the United States domiciled at Curacao who had not resided in the United States since 1841 (the opinion was given in 1869), and it did not appear affirmatively that any of the applicants had resided or intended to reside in the United States, or that more than one of them had ever been in the country. The Attorney General expressed the opinion that if the fathers of the applicants at the time of their birth were citizens of the United States and had "*at some time*" resided within the United States, the applicants were citizens of the United States under the provisions of the statute and entitled to the privileges of citizenship. As their fathers were native-born citizens of the United States, the applicants were probably citizens under Section 1993, whether their fathers at any time resided in the United States or not after the time of their birth. The point in the opinion by the Attorney General relied on by respondent's counsel is the intimation that these fathers should have "*at some time*" resided in the United States without restricting that residence to the time before their birth. The conclusion was that as these applicants had never been in the United States, there was no obligation to give them passports, even though they were citizens of the United States. We can hardly regard that as a decision upon the point we are considering.

In a work by Mr. Borchard, formerly Assistant Counsellor of the State Department, we find this:

> To confer citizenship upon a child born abroad, the father must have resided in the United States. This limitation upon the right of transmitting citizenship indefinitely was intended to prevent the residence abroad of successive generations of persons claiming the privileges of American citizenship while evading its duties. It seems not to have been judicially determined whether the residence of the father in the United States must necessarily have preceded the birth of the child, but by the fact that the statute provides that citizenship shall not 'descend', it is believed that the residence prescribed must have preceded the birth of the child, and such has been the construction of the Department. *Diplomatic Protection of Citizens Abroad*, (p. 609).

In his notes under this passage Mr. Borchard correctly points out that while the case of State *v.* Adams, 45 Iowa 99, cited for the respondent herein may have presented facts involving the point we are considering, it was not considered or discussed by the court.

Mr. Borchard also refers to special consular instructions of the State Department, No. 340, July 27, 1914, entitled "Citizenship of children born of American fathers who have never resided in the United States." These

were instructions issued by Mr. Bryan when Secretary of State ruling on the question whether residence by the father in Jerusalem where the United States exercised by treaty extraterritorial powers, was residence within the United States satisfying the requirement of Section 1993 and it was held not to be so, reversing former rulings. In these instructions Mr. Bryan indicated his view that foreign-born persons claiming citizenship under Section 1993 must fail if their fathers, citizens of the United States, had never resided in the United States when such persons were born, although this was not necessary to the decision he was making.

Mr. Bryan's instructions were based on an opinion of Mr. Cone Johnson, Solicitor of the State Department printed at pages 41 and 42 of a compilation concerning citizenship issued by the Department in 1925 in which Mr. Johnson suggested that Section 1993 might be construed to mean "all children heretofore or hereafter born out of the limits or jurisdiction of the United States whose fathers, having resided in the United States were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States."

Mr. Borchard's statement in his text that the construction of the Department has since been that the residence of the father must have preceded the birth of the child whose American citizenship is claimed rests on his personal experience and knowledge as an official of the Department and not on any subsequent printed publication of the Department, to which we have been referred.

It would seem then that the question before us is one that has really not been authoritatively decided except by two Circuit Courts of Appeals, that of the Ninth Circuit, which is here under review, and that of the Circuit Court of Appeals for the First Circuit (Johnson *v.* Sullivan, 8 F. (2nd) 988) which adopted the view of the Ninth Circuit Court and followed it.

The opinion in the Ninth Circuit says (p. 369):

> The statute refers to the descent of the rights of citizenship. The term "descend" has a well-defined meaning in law. As defined by Webster, it means: "To pass down, as from generation to generation, or from ancestor to heir." If the term "descend" is given that meaning in this connection, the status of the appellee would not become definitely fixed until his father became a resident of the United States or died without becoming such. In the former event he would become vested with all the rights of citizenship as soon as his father became a resident, while in the latter event his claim to citizenship would be forever lost.

The expression "the rights of citizenship shall descend" can not refer to the time of the death of the father, because that is hardly the time when they do descend. The phrase is borrowed from the law of property. The descent of property comes only after the death of the ancestor. The transmission of right of citizenship is not at the death of the ancestor but at the birth of the child, and it seems to us more natural to infer that the conditions

of the descent contained in the limiting proviso, so far as the father is concerned, must be perfected and have been performed at that time.

This leads to a reversal of the judgment of the Circuit Court of Appeals and a remanding of the respondent.

GENERAL CLAIMS COMMISSION—UNITED STATES AND MEXICO*

GEORGE ADAMS KENNEDY *v.* MEXICO (Docket No. 7)

Opinion rendered May 6, 1927

Damages awarded for denial of justice based upon the failure of the court to impose a punishment commensurate with the seriousness of a crime against an alien.

The international duty which a state has duly to punish those who, within its territory, commit a crime against an alien, implies the obligation to impose on the criminal a penalty proportionate to his crime. To punish by imposing a penalty that does not correspond to the nature of the crime is half punishment, or no punishment at all.

Counsel: United States, Bert L. Hunt; Mexico, Enrique Munguiá, Jr.

FERNÁNDEZ MACGREGOR, Commissioner:

1. This claim is presented by the United States of America in behalf of George Adams Kennedy, an American citizen, against the United Mexican States, demanding the amount of $50,000.00 with proper allowance of interest thereon, on account of damages suffered by the claimant, who received a wound in the right leg at the hands of Manuel Robles, a Mexican, on November 5, 1919, in San Javier, Sonora, Mexico. The claim is based (1) on a denial of justice resulting from the failure of the Mexican authorities to take adequate measures for the apprehension and punishment of the persons who, together with Robles, assaulted him, and resulting from the fact that although said Robles was arrested and judged, the proceedings were irregular, with the consequent result that a punishment was imposed on him out of proportion to his crime; and (2) on failure of the aforesaid Mexican authorities to give protection.

2. Briefly summarized, the facts on which this claim is based are as follows: claimant, George Adams Kennedy, was employed as assistant manager and engineer of the W. C. Laughlin Company, which company operated the Animas Mine in San Javier, Sonora, Mexico. It seems that at the time of the events, trouble had arisen between the company and the Mexican employees due to certain exactions on the part of both sides, and that three of the employees, including Manuel Robles, were the chiefs and representatives of said employees; that the company discharged, first, one of the three aforesaid men (November 3, 1919), and that in the morning of the next day,

* Established in pursuance of the convention between the United States and Mexico signed September 8, 1923. C. van Vollenhoven, *Presiding Commissioner;* Fred K. Nielsen, *Commissioner;* G. Fernández MacGregor, *Commissioner.*

Headnotes, footnotes, and summaries, supplied by the Managing Editor of the JOURNAL.

(November 4th) placards were found attached to the mine office door and at the shaft of the mine inciting the employees to go on strike; that said placards were sent to the municipal president of the town of San Javier, to place the matter before him and ask for the necessary protection—which was done orally and confirmed through a letter; that on the same date (November 4th), the other two chiefs or representatives of the workmen were discharged from the company for the best interest of the service; and then, as alleged, made threats against the officials of the company; that later on it was learned, through a shift boss, that the three discharged men were in the plaza of the town of San Javier inciting their companions to strike, for which reason said shift boss was sent to see the municipal president of the town to inform him of the situation and demand of him that the police be present at the mine at 6:30 o'clock on the following morning, although there is no positive evidence that the municipal president actually received this second demand for special protection.

3. At 6:30 o'clock in the morning, on November 5th, when the employees came in, Robles and one of the other discharged men appeared and advised their companions not to go to work. Robles demanded from Kennedy and the timekeeper of the mine, a notice which had been posted and which required the employees to come thirty minutes earlier than the usual hour, and upon such demand being refused, he started to argue with Kennedy. The latter alleges that Robles thereupon threatened him with his gun; that he, Kennedy, grasped it and attempted to take it away. A moment of confusion and struggle followed. Kennedy says that some of the workers, whose names he does not know, dealt him some blows which knocked him down causing him to loose his hold on the gun of Robles; that the latter stepped back; that Kennedy caught a piece of pipe and threw it at Robles, who was able to dodge it, and, then, said Robles fired upon and wounded Kennedy in the right thigh. Robles and the eye-witnesses agree that the former did not fire until Kennedy threw the pipe at him, but they leave in doubt as to whether Robles had previously drawn his gun. Kennedy was subsequently taken up and his wound treated. The local magistrate immediately took notice of the matter and arrested Robles, placing the latter at the disposal of the local judge of San Javier, who proceeded to initiate the prosecution, appointing at once experts to examine the victim of the attack and taking the statements of all the persons who took part in the events or were witnesses thereof. The first proceedings having been concluded, the cause was remitted to the judge of first instance of Hermosillo to continue the prosecution. Kennedy left the next day (November 6th) for Nogales, Arizona, U. S. A., where he arrived, after a painful trip, in the night of the same day and was taken to St. Joseph's Hospital. He was operated upon on November 11th and remained in the hospital for four months, after which he went to Denver, Colorado, United States of America, where he arrived on April 1, 1920. On April 3rd, he underwent another operation in the right

leg, which left it in a bad condition, for which reason he had to undergo other operations, also unsuccessful, that have left him permanently crippled. In the meantime, the prosecution of Robles before the judge of first instance of Hermosillo was continued, said judge having rendered, on March 2, 1920, a decision sentencing Robles to two months' imprisonment, but he immediately released him, as he had already been kept in jail five months. The sentence became final, because neither of the parties appealed from it.

4. In view of the foregoing facts, it is alleged, chiefly, that the procedure followed by the Mexican judge and his findings resulted in a denial of justice: (*a*) because the persons who took part in the attack provoked against Kennedy, were not punished; and (*b*) because a punishment was imposed on Robles notoriously out of proportion to the criminal act he committed. There is not sufficient evidence in the record to show that Kennedy may have been assaulted by other persons, outside of Robles; for, although it is true that Kennedy alleges, that a young man who was standing near Robles at the time of the scuffle, struck him on the head with the lamp, and that some others did the same thing, also seizing his hands to break his grip on the gun, on the other hand, Robles, as well as seven eye-witnesses ignore such allegations. In the confusion that followed the act of the fight between Kennedy and Robles, nobody probably realized exactly what was happening, and Kennedy himself affirms that he thought at first that the men who intervened, "were trying to intervene so that Robles would not shoot him." In view of these circumstances and the evidence which he had before him, the judge in the case could not, surely, consider guilty any other person than Robles, who had confessed his crime. It can not, then, be said that there may be a denial of justice on this ground.

5. The second ground on which a denial of justice is based, is, that the sentence of two months' imprisonment imposed on Robles is out of proportion to the seriousness of his crime. This assertion seems justified. In fact, I think that the international duty which a state has duly to punish those who, within its territory, commit a crime against aliens, implies the obligation to impose on the criminal a penalty proportionate to his crime. To punish by imposing a penalty that does not correspond to the nature of the crime is half punishment or no punishment at all. In order to reach the conclusion that the shooting was a very malicious act, it is sufficient to note that it was Robles who provoked the quarrel; that Kennedy was unarmed at the moment when he was fired upon; that the Mexican prosecuting attorney and judge discard the theory of self-defense; that the nature of the wound inflicted was serious. The commission has repeatedly expressed the repugnance it feels for the frequent and reckless use of firearms, and in the instant case one can do no less than think that it is a question of a serious aggression. The mere description of Kennedy's wounds shows their seriousness; the first medical report that was given, immediately after the events (November 5th), says that the principal wound "is in the front part of the

right thigh and near the groin . . . that the bullet penetrated, crossing the muscles and breaking the femur bone in the third superior section, and remained imbedded in the exterior part below the right hip, from where the bullet was extracted, which was found about to come out." Said report adds that "that wound, although serious, does not, *for the moment*, endanger the life of the wounded person, but it can later place it in danger if complications result." A sentence of two months' imprisonment for such a wound is a disproportionate penalty, and it can almost be said that it is an inducement for the commission of crimes of that kind. A municipal law which would oblige the judge to impose penalties of this nature could be considered, perhaps, as outside of the standards used by civilized countries. But no such charge can be made against Mexican law. As a matter of fact, the Penal Code of Sonora, Mexico, on the question of injuries, adjusts the penalty to their importance and their results, and for that purpose requires that no case involving personal injuries may be decided before the expiration of sixty days from the date on which the crime is committed, in order that the judge may know the probable result of such injuries, before imposing the sentence (Article 434). Furthermore, it provides that upon the expiration of the sixty days, two medical experts shall state the certain, or at least the probable, result of the injuries, and that having in mind such statement, final decision may be pronounced (Article 435). In the present case, the judge, for some inexplicable reason, did not comply with the requisites of his domestic law. It has been alleged that the record contains the medical certificate which described the wounds and to which reference is made above; that later, on December 27, 1919, the same physician who rendered the first certificate, together with a practical expert, certified that the wound received by Kennedy was not of the kind which necessarily endangers life and that it would take six weeks to two months to heal, without its resulting in the permanent incapacitation of the injured member, and that said expert opinion is sufficient, according to a provision of the Code of Criminal Procedure of Sonora (Article 111); that the diligence of the Mexican authorities in this respect, is shown by the fact that, in addition, the prosecuting attorney filed a motion on January 13, 1920, asking for a report on the condition of the patient from the physicians who were attending him at the St. Joseph's Hospital, in Nogales, Arizona, which motion was allowed by the judge, who, on his part, appointed two other physicians, Mexicans, who were to examine Kennedy, in pursuance of which letters rogatory were issued to the judge of first instance of Nogales, Mexico; it being further alleged that Mexican authorities are not responsible because of the failure to render such report, and that the judge could not wait indefinitely, in view of the fact that the Mexican Constitution prescribes a maximum period within which the delinquent must be tried. We can not take into account such allegations, because the first medical certificate referred only to the wound at the time it was received; because the second certificate could in no manner help the judge to know the

condition of the wounded man at the time of the trial, inasmuch as the physician and the practical expert, who issued such certificate and who were in San Javier, admit that they did not have before them the wounded man, as he was already in United States territory; and because the judge could have made urgent representations to the end that the physicians of the two towns of Nogales, who had later been appointed, would issue their certificate in time, as it must be taken into consideration that such certificate was requested on January 13, 1920, and sentence was not pronounced until March 2 of said year. It is true that the fact that the wounded man was absent made the completion of the proceedings more difficult; it is true that Kennedy's attorneys failed to take the necessary steps in order that the report would be rendered; however, the judge, on finding himself obliged to render judgment bound by the aforesaid provision of the Mexican Constitution, could have based himself, in imposing the sentence, on the nature itself of the wound, at least as described by the first medical certificate, which has all the aspects of being conscientiously made. The result of all was, that the judge ignored the seriousness of the injury suffered by Kennedy and that, exclusively basing his decision on the milder and conjectural certificate of December 27th, he imposed a penalty which was not the proper one for the crime of Robles, and even intentionally imposed the minimum of the inadequate penalty, basing his decision on the extenuating circumstance of confession on the part of Robles, when he had latitude to impose, at least, a longer term of imprisonment between two months and one year. In view of all the foregoing, it seems that there was negligence in a serious degree, and that such negligence constitutes a denial of justice.

6. Much stress has been laid upon the fact that the Mexican judge states in his sentence that the facts relating to the circumstances of the offense committed by Robles are supported by a document addressed by 54 laborers of the mine to one Leopoldo Ulloa, which document is contained in the record of the proceedings. That fact, it is deemed, can prove that the judge allowed himself to be unduly influenced. It is evident that such document could not be taken into consideration by the judge, because it lacked the requisites of evidence legally rendered, and that, therefore, the judge should not have even mentioned it in his sentence. But inasmuch as the judge did not avail himself of it, except to corroborate the circumstances of the offense that were already proven by statements of witnesses rendered according to law, the aforesaid fact does not reveal a serious transgression.

7. With regard to the allegation of failure to give protection, the following may be said: it seems that, notwithstanding the serious disturbances which occurred in that region—one of them being the insurrection of the Yaqui Indians—American lives and property in the mining district of Las Animas had been given adequate protection by the Mexican authorities; there is evidence that escorts had been furnished for the transportation of the company's minerals. On the other hand, there is no evidence that there may

have been failure to maintain the usual order which it is the duty of every state to maintain within its territory. The question lies in knowing whether the special demand for protection made by the American employees of the mine, due to the labor problems which had arisen between the management and the workmen, was such as to require the Mexican authorities to take extraordinary measures. The first alleged demand for protection was that made orally and later confirmed by letter to the municipal president of San Javier on November 4th; it referred to threats of a strike and other vague threats made by the discharged workmen, the letter sent to the municipal president mentions "difficulties between the company and its workmen in the mine," the interference by a worker called Rendón, who had repeatedly made threats against his chiefs, which threats are not specified, and it ended saying: "this company respectfully brings this matter to your attention requesting you to take the matter in hand and prevent the said Mr. Rendón from continuing in the interference of the operation and business of this mine." It seems that the municipal president promised to attend to the matter. Taking into account the circumstances set forth by the company, I do not see that it might be a question of imminent danger which would require urgent measures either that very day or at the beginning of the next day. The second more definite demand for protection was made, according to Kennedy and an American companion of his, after Robles and another fellow-worker were discharged, on November 4th, after 9:30 at night, through one Dominguez. The municipal president was asked to send *a police officer* at six-thirty the following day, November 5th, to "arrest" the "agitators" and, if necessary, "to prevent their interfering with the shift going to work." There is not sufficient evidence that this second demand reached the municipal president; Mexico might perhaps have cleared up this doubtful point. However, considering the evidence in the record, it seems to me that it is not possible to establish any responsibility on the part of Mexico for failure to give protection.

8. In view of the foregoing, I believe that this claim can be properly grounded only on a denial of justice resulting from the failure to have imposed on Kennedy's aggressor a punishment commensurate with his offense; but, taking into account that the irregularity imputed on the procedure of the Mexican judge was to a certain extent due to the lack of diligence on the part of claimant's attorneys and physicians, taking into account, further, that it is a question of indirect responsibility, and the principles mentioned in paragraph 25 of the opinion rendered in the Janes case,[1] Docket No. 168, I believe that the sum of $6,000.00 (six thousand dollars) is an adequate award.

VAN VOLLENHOVEN, Presiding Commissioner:

I concur in Commissioner Fernández MacGregor's opinion.

[Separate opinion of NIELSEN, commissioner, not printed.]

[1] Printed in this JOURNAL, April, 1927 (Vol. 21), p. 362.

DECISION

The Commission decides that the Government of the United Mexican States is obligated to pay to the Government of the United States of America on behalf of George Adams Kennedy the sum of $6,000.00 (six thousand dollars) without interest.

Done at Washington, D. C., this 6th day of May, 1927.

C. VAN VOLLENHOVEN,
Presiding Commissioner.
FRED K. NIELSEN,
Commissioner.
G. FERNÁNDEZ MACGREGOR,
Commissioner.

PEERLESS MOTOR CAR COMPANY *v.* MEXICO (Docket No. 56)

Opinion rendered May 13, 1927

Mexican Government held liable for purchase price of two ambulances contracted for and delivered to the *de facto* Huerta administration.

The purchase of ambulances is an impersonal transaction of government routine. Decision in Hopkins *v.* Mexico followed.

Counsel: United States, Stanley H. Udy; Mexico, Francisco A. Ursúa.

NIELSEN, Commissioner:

1. Claim is made in this case by the United States of America in behalf of the Peerless Motor Car Company, an American corporation, to obtain payment of 23,000 Mexican pesos, which it is alleged is due as the purchase price of two automobile ambulances, under a contract entered into July 25, 1913, between the Mexican Government and the claimant. Interest on this sum is claimed from October 15, 1913.

2. The contract, a copy of which accompanies the memorial (Annex 2), recites that it is executed in fulfillment of an order "of the Department of War and Navy, between the Chief of the Military Sanitary Section, Colonel Augustín Nieto y Mena, M.D. and Mr. Joseph M. Wheeler, merchant of this city [Mexico City] and representative of 'The Peerless Motor Car Company.'" By the third paragraph of the contract it is stipulated that payment for the ambulances shall be made "as soon as the said ambulances are duly received." Under date of October 15, 1913, a receipt for the ambulances bearing the signature of A. Nieto y Mena was delivered to Joseph M. Wheeler, the claimant's representative in Mexico City. In this receipt it is recited that the ambulances received are complete and satisfactory, and that payment will be made to Wheeler immediately (Annex 6 to the memorial).

3. In the arguments advanced before the Commission both governments rely upon the decision rendered by the Commission in the Hopkins case,[1]

[1] Printed in this JOURNAL, January, 1927 (Vol. 21), p. 160.

Docket No. 39. In behalf of the Government of Mexico it is not disputed that the automobiles were manufactured and delivered comformably to the terms of the contract, and that the purchase price has not been paid. But it is contended that there is no international responsibility on the Mexican Government for, as stated in the answer, "the non-payment of certain war material admitted by the claimant corporation to have been ordered by, and sold and delivered to an illegitimate administration," that is, the administration of General Victoriano Huerta. It is further alleged in the answer that "even assuming that the legitimate government of the United Mexican States had subsequently to the sale and delivery of the war material aforesaid to the local *de facto* administration become possessed of the said war material, no liability could be predicated upon the said respondent government neither in international law, nor equity, nor justice, since the said possession was due to the recognized right that all legitimate governments possess to capture the war material of the enemy."

4. In the view I take of this case it is unnecessary to consider the point as to the responsibility of Mexico grounded on the contention of the United States that it may be assumed from the record that Mexican authorities in power following the administration of General Huerta made use of the cars delivered by the company. Nor is it necessary to consider the Mexican Government's contention as to the character of the ambulances as war material. The United States contends, among other things, that the purchase of these motor ambulances was an unpersonal act, and that therefore, under the principles laid down in the Hopkins case, Docket No. 39, the Government of Mexico is liable for the purchase price of the ambulances. I am of the opinion that the contention is sound, and that an award should therefore be rendered in favor of the United States in the sum of 23,000 pesos with interest from October 15, 1913, the date on which the receipt for the ambulances was delivered to the claimant's representative at Mexico City.

VAN VOLLENHOVEN, Presiding Commissioner:

I concur in Commissioner Nielsen's conclusion with respect to the liability of Mexico. The purchase of ambulances, however, in my opinion is not a part of the ordinary routine of government business. It comes within the doubtful zone mentioned in paragraphs 5 and 6 of the opinion in the Hopkins case. As such, it is much more akin to a transaction of government routine (the one extreme) than to any kind of voluntary undertaking "having for its object the support of an individual or group of individuals seeking to maintain themselves in office" (the other extreme), and therefore should, under the principles laid down in the said opinion, be assimilated to the first group, to-wit: the routine acts.

FERNÁNDEZ MACGREGOR, Commissioner:

I concur in the opinions expressed by Commissioners Van Vollenhoven and Nielsen.

DECISION

The Commission decides that the Government of the United Mexican States shall pay to the Government of the United States of America in behalf of the Peerless Motor Car Company the sum of $11,465.50 (eleven thousand four hundred and sixty-five dollars and fifty cents) together with interest on that sum at the rate of six per centum per annum from October 15, 1913, to the date on which the last award is rendered by the Commission. The said amount of $11,465.50 is the equivalent of 23,000.00 pesos for which claim is made. The Commission renders the award in the currency of the United States comformably to its practice in other cases of making all awards in a single currency, having in mind the purpose of avoiding future uncertainties with respect to rates of exchange which it appears the two governments also had in mind in framing the first paragraph of Article IX of the Convention of September 8, 1923, with respect to the payment of the balance therein mentioned "in gold coin or its equivalent."

Done at Washington, D. C., this 13th day of May, 1927.

C. VAN VOLLENHOVEN,
Presiding Commissioner.
FRED K. NIELSEN,
Commissioner.
G. FERNÁNDEZ MACGREGOR,
Commissioner.

TOBERMAN, MACKEY & COMPANY *v.* MEXICO (Docket No. 17)

Opinion rendered May 20, 1927

Mexican Government held not liable for damages to a shipment of American hay which was refused by Mexican consignees and deteriorated in the Mexican custom house during a long period of storage there and finally had to be burned.

There is no clear principle of international law which obliges a government to take special care, as if it were a private storage concern, of merchandise which comes in through its customs houses for the mere purpose of exercising the sovereign right of collecting import and export duties. Mexican law in this respect is sufficiently clear and imposes no obligation on its customs houses of guarding at all times and without limit, like a good *pater familias*, all goods and merchandise which pass through its ports of entry.

Counsel: United States, John J. McDonald, Assistant Agent; Mexico, Eduardo Suárez.

FERNÁNDEZ MACGREGOR, Commissioner:

1. This claim is presented by the United States of America in behalf of Toberman, Mackey & Company, an American corporation, demanding from the United Mexican States the sum of $1,845.57, with interest, the value of 376 bales of hay, property of claimants, which was damaged in the Mexican custom house of Progreso, Yucatán, Mexico, between the beginning of June, 1919, and July 23, 1920. It is alleged that the hay in question became completely deteriorated by exposure to the weather, on account of the negligence or lack of care of the authorities of the Mexican custom house.

2. The evidence presented in this case shows that Toberman, Mackey & Company, an American firm dealing in grains, seeds, fodder and other products, having previously received an order from the firm of Crespo and Suárez, of Progreso, shipped in New Orleans, Louisiana, U. S. A., on a Norwegian vessel, June 3, 1919, 376 bales of compressed hay, under a bill of lading issued by the Gulf Navigation Company, Inc. The shipment was consigned to shipper's order, Crespo and Suárez to be notified upon its arrival, who, although they apparently had dissolved partnership on January 31, 1919, continued to do business jointly or separately. The shipment of hay was delivered by the steamer to the custom house at Progreso sometime during the early part of June, and it was placed in an open space on the wharf, covered only with a canvas. Crespo and Suárez did not accept the hay, due, apparently, to some questions as to the manner of making payment for it, the result of which was, that they neither took steps to withdraw the hay from the custom house nor to pay the import duties. The Gulf Navigation Company, Inc., on August 7, 1919, received from one Mariano de las Cuevas, who seems to have been the shipping company's agent, notice that Crespo and Suárez had not withdrawn the hay, in spite of his having urged them to do so, and that the hay had deteriorated somewhat on account of rains which had fallen. The Gulf Navigation Company, Inc., on December 12, 1919, notified claimants that Crespo and Suárez had definitely refused to accept the shipment of hay; that the latter was already in a rather bad state, after a long period of storage in the custom house; and that the shipment was to be auctioned in conformity with customs regulations. Finally, the custom house, in compliance with said regulations, and as the hay was then useless, burned it on July 23, 1920.

3. The claimant government alleges that the custom house of Progreso was negligent on account of not having taken due care of the fodder in question, as shown by the fact that it left said fodder in the open, exposed to the elements, for more than one year; that such negligence of Mexican officials, which was the cause of the complete loss of the goods, makes the Mexican Government responsible according to general principles of law, as well as under special provisions of the General Customs Regulations of the United Mexican States (Articles 120, 153, and others). The Mexican Government, on its part, alleges in defense, that the loss of the hay was due to the negligence of the consignees, of the shipping company or of the claimants, who did not comply with said customs regulations, citing also the provisions thereof to support their contention.

4. This case involves, therefore, an alleged act of a Mexican authority, which act, in the terms of the convention of September 8, 1923, has resulted in injustice to American citizens Said act is the omission of a custom house to take due care of merchandise deposited therein. I do not believe that there is any clear principle of international law which obliges a government to take special care, as if it were a private storage concern, of merchandise

which comes in through its custom houses, for the mere purpose of exercising the sovereign right of collecting import and export duties. It is conceivable that, under certain circumstances, the State may assume certain obligations in the exercise of sovereign acts of this nature; but, if such obligation is not established very clearly, it cannot, in my opinion, be imposed on the State. The question lies in determining whether the law of such State (in this case, Mexican law) imposes on custom houses the obligation of guarding, at all times and without limit like a good *pater familias*, all goods and merchandise which pass through its ports of entry. Mexican law in this respect is sufficiently clear, according to my opinion. In fact, the General Customs Regulations of Mexico require that application be filed for the dispatch of imported goods, within eight days following the date of unloading, and that the merchandise be withdrawn, at the latest, thirty days after unloading has been finished (Article 152). The party obliged to comply with these obligations, is the consignee (Article 109). When the parties concerned do not file their applications within said periods, the merchandise may remain in the storehouses or yards of the custom house, incurring a custody charge (*derecho de guarda*), the custody being limited to preventing the loss of the merchandise by theft or otherwise (Articles 153 and 698), but the law further provides, that complaints filed against the custom house attributing to it delay in the timely withdrawal of the merchandise within the periods provided by the regulations, will not be taken into consideration (Article 152). The same law presumes that the merchandise may be placed, in the absence of a special petition, on the yards or in the storehouses, without determining in which cases one or the other must be done. From the foregoing citations it is inferred that, although the merchandise may remain in the custom house after the expiration of the term allowed for its withdrawal, said custom houses refuse to accept any responsibility for its deterioration once that term has expired. It remains doubtful whether such responsibility is assumed for the month in question, although it may be presumed that it could be legally so. But in the present case, claimants have not proven that the complete deterioration and loss of the hay may have commenced during the first month that such hay was on the yards of the custom house. On the other hand, although it is true that the consignees were the claimants, they stipulated that Crespo and Suárez should be notified, who, it appears, were the purchasers of the merchandise. Either of these parties should have paid the duties, applied for the dispatch of the shipment, and withdrawn the hay. Crespo and Suárez should have been given timely notice of the arrival of the hay, by the claimants themselves, as may be implied from the letter of February 27, 1920, signed by one W. M. James, and they doubtless received later on notice from said Mariano de las Cuevas. However, they did not file their application within the eight days, nor did they withdraw the merchandise within thirty days after unloading; neither did they specifically refuse, before the custom house, acceptance of the shipment (Article 113). The shippers, Toberman, Mackey & Company, also should have been given

timely notice by said Crespo and Suárez that the latter were having difficulties in obtaining the merchandise, and, at least, they were so notified on December 12, 1919, by the Gulf Navigation Company, Inc., in a letter which causes the presumption that they had already been given notice of this fact previously. Both parties incurred the delay on account of this failure to comply with the clear provisions of Mexican law, and it was their negligence that unduly threw on the Mexican custom house authorities, the care of the merchandise, which care they had in no way contracted for. There cannot be, therefore, imputed to the custom house a responsibility which it did not have, nor assumed clearly, and which, on the other hand, was thrown on it by the negligence of the consignees and claimants in this case, who, it appears, had a clear knowledge of the circumstances in which the merchandise was shortly after its arrival at Progreso, and, surely, two months after such arrival. Under such circumstances, taking into account that in this case no discrimination or other unjust act on the part of Mexican customs authorities have been proven, and that the negligence of the owners and consignees of the bales of hay in question appears evident, I believe that this claim should be disallowed.

VAN VOLLENHOVEN, Presiding Commissioner:

I concur in Commissioner Fernández MacGregor's opinion.

[Separate opinion of NIELSEN, Commissioner, not printed.]

DECISION

The Commission decides that the claim of Toberman, Mackey & Company must be disallowed.

Done at Washington, D. C., this 20th day of May, 1927.

C. VAN VOLLENHOVEN,
Presiding Commissioner.
FRED K. NIELSEN,
Commissioner.
G. FERNÁNDEZ MACGREGOR,
Commissioner.

GEORGE W. COOK *v.* MEXICO (Docket No. 2189)

Opinion rendered June 1, 1927

Mexican Government held liable for the value of postage stamps, the use of which was prohibited without proper public notice as required by Mexican law, and for which the claimant had no opportunity to obtain other stamps in substitution conformable to law, nor to obtain the value of the stamps so nullified.

Counsel: United States, William E. Linden; Mexico, E. Martínez Sobral, Assistant Agent.

NIELSEN, Commissioner:

1. Claim is made in this case by the United States of America in behalf of George W. Cook to recover the sum of $153.52, stated to be the equivalent of 307.04 pesos, the value of two quantities of postage stamps, which were purchased by the claimant from Mexican postal authorities and which sub-

sequent to the purchase were declared void. The stamps were submitted to the Commission for examination. Interest is claimed from November 15, 1914, on the sum of $131.95 and from September 15, 1915, on the sum of $21.57. The facts on which the claim is based as they appear from the record may be briefly stated as follows:

2. Under date of October 7, 1914, a circular communication was issued at Mexico City by the Mexican Postmaster General prohibiting the use after November 15, 1914, of a certain issue of stamps of which the claimant possessed a considerable quantity. It appears that Articles 194 and 195 of the Postal Code of Mexico make provision for the retirement of stamps upon a three months' notice, and that holders of stamps may, within the prescribed period of three months, effect an exchange of stamps which they possess for a new issue. It is provided that those who have not effected an exchange within this period shall lose not only the right to exchange the old stamps for new ones but also the value of the retired stamps which they may possess.

3. In communications dated January 14, 1915, and June 5, 1915, the claimant requested the Mexican authorities to effect an exchange or payment of stamps which he held of the value of 262.94 pesos, but no reply was made to his letters. In communicating with the Mexican authorities, the claimant mentioned stamps to the value of 262.94 pesos; from the memorial it appears that he held invalidated stamps to the value of 263.89 pesos at the time he wrote these letters. It is clear that no notice of three months was given by the postal authorities with regard to the retirement of the stamps in question. Furthermore, there is no proof that notice was given by postmasters as required by law of the retirement of the nullified stamps, within even a period of thirty-nine days, that is, from October 7, to November 15, 1914, the latter date being that on which the invalidation of the stamps took effect. While the point is immaterial in view of the fact that the legal notification prescribed by the Postal Code was not given, it may be noted that, had there been any public notice given of the retirement of the stamps on a shorter notice, evidence of such public notice could apparently easily have been produced. Notifications issued by postmasters to the public are, of course, something very different from instructions sent to the postmasters through the mail by the Postmaster General. Obviously the claimant was deprived improperly of the value of the stamps nullified by the order of October 7, 1914. In transmitting mail the claimant would, of course, not make use of stamps which had been declared void or stamps concerning the validity of which there might be some question.

4. The claimant's rights with respect to another quantity of stamps to the value of 43.15 pesos is equally clear, or perhaps it might better be said, still more clear. These stamps bore the printed inscriptions "*Gobierno Constitucionalista*" and the letters "*G C M.*" Under date of July 6, 1915, an order was issued that these postage stamps should be invalid from September 16, 1915, and that no new issue should be placed in circulation. It will be seen

from this order that there was no compliance with the Mexican Code either with respect to a three months' notice of the nullification of stamps or with respect to the substitution of stamps in place of those nullified. Obviously, therefore, the claimant was deprived of his property.

5. The Mexican Agency has put in evidence a communication under date of September 8, 1926, addressed by the Mexican Postmaster General to the Department of Foreign Relations in which reference is made to a letter of February 9, 1926, addressed to W. Hansberg, an employee of Mr. Cook's firm. Nothing is said with regard to the contents of this communication, except that Mr. Hansberg "was not advised that the stamps to which he referred, were valid up to the year 1925, inasmuch as this office, on July 31, 1921, through its official organ, Bulletin of the Postal Service, advised all post offices of the Republic to notify the public that, beginning with September 1st of that year, postage stamps of the 'Centenary Issue' would again be effective." Even if Mr. Hansberg had been informed in 1926, as it is stated he was not, that the stamps would again be effective up to the year 1925, such information would, of course, have been of no value to Mr. Cook in 1926. It is not perceived how the notification to the post offices to which reference is made in the above quoted extract could have any bearing on any issue in the instant case. In any event no copy of the notification to the post offices is produced, so that the Commission is not in a position to make any determination with respect to its legal effect. And no evidence is furnished that the post offices made any notification to the public to the effect that the so-called "Centenary Issue" would again be effective. If such evidence existed it evidently could easily have been produced, so that its contents and its bearing, if any, on the present case could be determined. It is nowhere even stated that a notification was given to the public. It is merely stated in the communication of September 8, 1926, that the post offices were advised to notify the public. Some of the stamps held by the claimant for which he seeks compensation evidently belonged to this "Centenary Issue."

6. In the Mexican brief, it is stated that Mr. Cook must have seen more than once that stamps like his own were being used on the letters confided to the Mexican postal services; that he must have received correspondence addressed to him bearing those stamps; and that it did not occur to him to use them or transfer them. In my opinion it is highly improbable that even if some of these stamps were used on letters addressed to Mr. Cook—a thing concerning which, of course, we know nothing—they should ever have attracted the eyes of a business man of large affairs. Assuredly a business man to whose establishment comes a large quantity of mail which is generally opened by clerks does not make a personal examination of every stamp that comes to his place of business. Moreover, it is highly improbable that stamps belonging to the limited issues which were nullified by the postal authorities ever came to Mr. Cook's office. And it is possible, and perhaps it may be said very probable, that none was ever used by anybody in Mexico.

Whatever action may have been taken to give the public notice of a revalidation of the nullified stamps—and the record is too uncertain to reach any conclusion on that point—nothing was done until six years after the stamps had been nullified. Even though the observations made in the Mexican brief concerning stamps that may have been seen by Cook had any bearing on the issues in the instant case, which I believe they have not, the Commission can not ground a decision on inferences of that kind, even if there were some foundation for them which I think there is not.

7. There are certain very simple facts and principles of law which I think are clearly decisive in this case. It would seem that there can be no more elementary principle of law than that the propriety of an act must be judged by the law existing at the time of the commission of the act. It is indisputable that Mr. Cook paid for the stamps that were nullified. Indeed as a matter of accommodation he took a large quantity of stamps in payment of money orders. It is also indisputable that he could not use nullified stamps, nor obtain other stamps in substitution conformably to law, nor obtain the value of the stamps nullified. It is obvious that he is entitled to pecuniary compensation to the amount he paid for the stamps which amount the Mexican authorities received.

8. I am of the opinion that an award should be rendered in this case in favor of the claimant in the amount of $153.06 with interest at the rate of six per centum per annum, on the sum of $131.55 from November 15, 1914, and on the sum of $21.51 from September 15, 1915, such interest being computed on both sums from each of the two specified dates to the date on which the last award is rendered by the Commission.

[Separate opinion of Van Vollenhoven, Presiding Commissioner, not printed.]

DECISION

The Commission decides that the Government of the United Mexican States shall pay to the Government of the United States of America in behalf of George W. Cook the sum of $153.06 (one hundred and fifty-three dollars and six cents) with interest at the rate of six per centum per annum, on the sum of $131.55 from November 15, 1914, and on the sum of $21.51 from September 15, 1915, such interest being computed on both sums from each of the two specified dates to the date on which the last award is rendered by the Commission. Conformably to the practice of the Commission of making awards in a single currency, the award is expressed in the currency of the United States, the Mexican peso being converted at its par value of $0.4985.

Done at Washington, D. C., this 1st day of June, 1927.

C. VAN VOLLENHOVEN,
Presiding Commissioner.
FRED K. NIELSEN,
Commissioner.

[Dissenting opinion of MacGregor, Commissioner, not printed.]

GEORGE W. COOK *v.* MEXICO (Docket No. 663)

Opinion rendered June 3, 1927

Mexico held liable for the amount of numerous postal money orders issued by the *de facto* Huerta administration, which were not paid upon presentation to the Mexican postal authorities within the period of time prescribed by Mexican law.

The Mexican Government could not, by withholding payment for the period prescribed by a domestic statute of limitations, relieve itself from the obligation under international law to make restitution of the value of the orders. There is no rule of international law putting a limitation of time on diplomatic action, or upon the presentation of an international claim to an international tribunal.

An international tribunal does not sit as a domestic court to apply domestic law. When questions are raised before such a tribunal with respect to the application of the proper law in the determination of rights grounded on contractual obligations, the nature of such contractual right or rights is determined by the local law that governs the legal effects of the contract, but the responsibility of the respondent government is determined solely by international law.

Counsel: United States, C. L. Bouvé, Agent; Mexico, E. Martínez Sobral, Assistant Agent.

NIELSEN, Commissioner:

1. Claim is made in this case by the United States of America in behalf of George W. Cook to recover the sum of $4,526.58, United States currency, stated to be the equivalent of 9,053.16 Mexican pesos, the aggregate amount of numerous postal money orders, which are owned by the claimant, and which it is alleged were not paid upon presentation to Mexican postal authorities. The orders were issued in the years 1913 and 1914. A proper allowance of interest is claimed on the said sum of $4,526.58.

2. The answer of the Mexican Government contains an allegation to the effect that the money orders in question were issued by an illegitimate authority (the administration of General Huerta) which could not bind the United Mexican States. However, no contentions on this point were pressed in view of the decision rendered by the Commission in the Hopkins[1] case, Docket No. 39, on March 31, 1926.

3. In the brief filed by the Mexican Government in the case of the Parsons Trading Company,[2] Docket No. 2651, of which use was made in the argument in the instant case, it is alleged that the right to collect a postal money order is subject to a statute of limitations of two years after the date of issue, and that a recovery on the orders in question is now barred by that statute. Finally, it is argued that, if a pecuniary award should be rendered by the Commission the amounts stated in the money orders should be calculated on the basis of the so-called Mexican Law of Payments of April 13, 1918. It is explained that this law had for its object the partial lifting of a general moratorium created by earlier legislation, and that the law established certain specified equivalents in gold currency of obligations contracted in paper currency. It is asserted that money orders are contractual obligations, and

[1] Printed in this JOURNAL, January, 1927 (Vol. 21), p. 160.

[2] Summary of opinion printed *infra*, p. 194.

that the law of April 13, 1918, as a part of the *lex loci contractus*, is applicable to the payment of such orders.

4. It has sometimes been said that statutes of limitation are not a bar to international reclamations. General statements of this kind have perhaps at times led to some confusion of domestic law with a well recognized principle of international practice. There is, of course, no rule of international law putting a limitation of time on diplomatic action or upon the presentation of an international claim to an international tribunal. Domestic statutes of limitation take away at the end of prescribed periods the remedy which a litigant has to enforce rights before domestic courts. It is satisfactorily established by evidence that the claimant in the instant case presented his money orders and requested payment within the period during which payment could be made under Mexican law, and that payment was refused by Mexican postal authorities. The United States is not now debarred by any Mexican statute of limitations from recovering money wrongfully withheld from the claimant. The Mexican Government could not by withholding payment for a period prescribed by a domestic statute of limitation relieve itself from an obligation under international law to make restitution of the value of the orders. From a conclusion to this effect it does not follow that international tribunals must always disregard all statutes of limitation prescribing reasonable periods within which remedies may be enforced before domestic tribunals. And it may be further observed that in view of the stipulations of Article V of the Convention of September 8, 1923, no question can arise in this case with respect to the exhaustion of local remedies.

5. The issue determinative of responsibility in this case is a simple one, and when its real character is perceived it is clear that the arguments advanced before the Commission covered a wide range of subjects not relevant to a proper disposition of the case. It is not necessary to take account of the considerations explained by Mexico with respect to economic conditions in Mexico which prompted the enactment of the law of April 13, 1918. Nor is it necessary to determine whether Mexican money orders must be regarded as contracts, governed in all respects by the *lex loci contractus*, including the law of April 13, 1918, or whether it may more properly be considered that money orders are not commercial transactions, as was said by an American judge with respect to American money orders, but rather the means employed in exercising a governmental power for the public benefit. Bolognesi *et al. v.* United States, 189, Fed. Rep. 335. In a sense it may doubtless be said that a money order of the usual type evidences on the one hand some obligation of the government that issues it to pay the value of the order, and on the other hand the right of the holder to receive payment. Furthermore, it is not necessary to give application in the present case to the principles asserted by the Commission in the Hopkins case[1] to which counsel for the

[1] Printed in this JOURNAL, January, 1927 (Vol. 21), p. 160.

United States called attention as to the standing of domestic statutes which by their operation on rights of aliens may contravene international law.

6. Obviously, rights and obligations in relation to money orders, the creatures of Mexican law, are governed by that law. But the Commission is not called upon to consider whether, if the Mexican Government had forced the claimant to accept payment according to the table of payments prescribed by the Mexican law of April 13, 1918, such action would have resulted in a violation of international law. The Mexican authorities have refused to make any payment. The questions before the Commission are, first, whether the failure of the Mexican Government to pay to the claimant the value of the money orders upon presentation renders the Government of Mexico liable under the terms of submission in the convention of September 8, 1923, requiring the Commission to determine claims in accordance with principles of international law, and, second, if such liability exists what sum shall be awarded for wrongful withholding of the purchase prices of the orders. That responsibility in a case of this character exists was stated by the Commission in the decision rendered in the Hopkins case on March 31, 1926.

7. When questions are raised before an international tribunal, as they have been in the present case, with respect to the application of the proper law in the determination of rights grounded on contractual obligations, it is necessary to have clearly in mind the particular law applicable to the different aspects of the case. The nature of such contractual rights or rights with respect to tangible property, real or personal, which a claimant asserts have been invaded in a given case is determined by the local law that governs the legal effects of the contract or other form of instrument creating such rights. But the responsibility of a respondent government is determined solely by international law. When it is alleged before an international tribunal that some property rights under a contract have been impaired or destroyed, the tribunal does not sit as a domestic court entertaining a common law action of assumpsit or debt, or some corresponding form of action in the civil law. And in a case involving damages to or confiscation of tangible property, real or personal, inflicted by agencies for which a government is responsible, or by private individuals under conditions rendering a government liable for wrongs inflicted, an international tribunal is not concerned with an action in tort, the merits of which must be determined according to domestic law. The ultimate issue upon which the question of responsibility must be determined in either of these kinds of cases is whether or not there is proof of conduct which is wrongful under international law and which therefore entails responsibility upon a respondent government.

8. By the failure of the Mexican authorities to pay the money orders in question in conformity with the existing Mexican law when payment was due, the claimant, Cook, was wrongfully deprived at that time of property in the amount of 9,053.16 pesos. Payment of the orders should have been

made when they were presented. The claimant is entitled to recover the loss which he sustained on account of the nonpayment at that time. An award should therefore be rendered by the Commission in favor of the claimant for the amount of the orders, namely 9,053.16 pesos with interest. The total sum represents the legal measure of the loss suffered by the claimant when payment of the orders was refused. Since it is desirable to render the award in the currency of the United States conformably to the practice which the Commission has followed in the past, having in mind the desirability of avoiding uncertainties with respect to rates of exchange, and further having in mind the provisions of the first paragraph of Article IX of the convention of September 8, 1923, account must be taken of the proper rate of exchange.

9. Domestic courts have frequently had occasion, especially in recent years, to deal with the translation into the currency of their own country monetary judgments in satisfaction of obligations fixed in the terms of the currency of some other country. In the absence of evidence with regard to the value of a foreign coin it has been held that the par value should be taken. Birge-Forbes Company *v.* Heye, 251 U. S. 317. The courts are required to convert currency in these cases in view of the fact that they can render judgments only in coin of the government by which they were created. However, the principles which these courts have considered in arriving at their decisions may have some pertinency to a case such as that before the Commission, since the translation of currency either by an international tribunal or by a domestic court must be based on some principle that is sound from the standpoint of the interests of the parties to the litigation. Some courts have held that in the case of a breach of contractual obligations the rates of exchange should be determined as of the date of the breach. Others have held that the rate should be fixed as of the date of judgment. In a recent case the Supreme Court of the United States held that the debt of a German bank to an American citizen arising from the refusal to pay a deposit on demand should be determined as of the value of the mark at the time suit was brought. Die Deutsche Bank Filiale Nurnberg *v.* Humphrey, 272 U. S. 517. In a Brief filed by counsel in the case of Hicks *v.* Guinness *et al.*, 269 U. S. 71, are cited numerous decisions of each kind. I am of the opinion that in the instant case the par value of the Mexican peso, namely $0.4985, may properly be taken in determining the amount to be awarded in the currency of the United States. There are several considerations which I think justify this conclusion. Mexico withheld payment of the money orders, and the claimant should be reimbursed in the full value of the orders. That payments were not made is satisfactorily shown by evidence, but the date upon which payment of each order was refused is uncertain, and it is natural that the claimant should not be able to furnish precise information in each case. There is not, in my opinion, before the Commission the proper kind of evidence on which the Commission could properly

determine the rate of exchange on each of those dates or an average rate of exchange during the period within which the orders were dishonored, even if such computations might be deemed to be proper. And what is probably more to the point, Mexico has not contended that the prevailing exchange rates at the time the orders were dishonored should be applied, but has insisted that an award should be rendered in terms of the law of payments of April 13, 1918.

10. Having in mind the uncertainty in the record as to the specific dates on which payment of each of the several money orders was refused, I am of the opinion that interest may properly be allowed on the sum of $4,513.00 from the date of the last order, namely, September 21, 1914.

VAN VOLLENHOVEN, Presiding Commissioner:

I concur in paragraphs 1 to 4, inclusive, 8 and 10 of Commissioner Nielsen's opinion. Amounts which fell due to claimants in Mexico in the years 1913 to 1915 when a depreciated paper currency was in circulation throughout the country should be awarded by this Commission in strict compliance with the monetary enactments of Mexico effective in those years, unless in any specific case there might be conclusively proven that by so doing the Commission would cause the claimants an unjust enrichment. In the present case not only such evidence fails, but it would seem from the record that Cook, in having the full value of his money orders reimbursed to him, would only receive the value of what he sold, delivered and was compensated for by way of these money orders. I therefore am of the opinion that an award should be rendered in the sum of $4,513.00, with interest thereon.

FERNÁNDEZ MACGREGOR, Commissioner:

I concur in the opinion of the Presiding Commissioner.

DECISION

The Commission decides that the Government of the United Mexican States shall pay to the Government of the United States of America in behalf of George W. Cook the sum of $4,513.00 (four thousand five hundred and thirteen dollars) with interest at the rate of six per centum per annum from September 21, 1914, to the date on which the last award is rendered by the Commission.

Done at Washington, D. C., this 3d day of June, 1927.

C. VAN VOLLENHOVEN,
Presiding Commissioner.
FRED K. NIELSEN,
Commissioner.
G. FERNÁNDEZ MACGREGOR,
Commissioner.

PARSONS TRADING COMPANY *v.* MEXICO (Docket No. 2651)

Opinion rendered June 3, 1927

The sum of $191.51, with interest at 6% per annum from August 1, 1914, to the date on which the last award is rendered by the Commission, unanimously awarded by the Commission upon similar facts and for the reasons given in the preceding opinion in the Cook Case, Docket No. 663.

JOHN A. MCPHERSON *v.* MEXICO (Docket No. 126)

Opinion rendered June 3, 1927

The sum of $697.90, with interest at the rate of 6% per annum from June 25, 1914, to the date on which the last award is rendered by the Commission, unanimously awarded by the Commission upon similar facts and for the reasons given in the opinion in the Cook Case, Docket No. 663, *supra*.

Objection by Mexico that the claim could not be maintained before the Commission because the money orders were issued in the name of an agent of non-American nationality was overruled upon convincing evidence that the payee named in the money orders was acting merely as agent, and that the American claimant was the real party in interest.

GEORGE W. HOPKINS *v.* MEXICO (Docket No. 39)

Opinion rendered June 3, 1927

The facts in this case were similar to those in the Cook Case, Docket No. 663, *supra*, and the McPherson Case, Docket No. 126, *supra*. An award of $211.06, with interest at the rate of 6% from June 6, 1914, to the date on which the last award is rendered by the Commission, was made for the value of three money orders issued to the claimant, two of which were endorsed by him to a German bank for collection. The Commission refused an award for the value of three other orders made payable to the German bank and endorsed to a non-American national, whose agency to act for the American claimant was not established to the satisfaction of the Commission.

BOOK REVIEWS*

Recueil des Cours, 1925. Académie de Droit International. Paris: Librairie Hachette, 1926. 2 vols. Vol. IV, pp. 576; Vol. V, pp. 617.

In the last number of this JOURNAL (pp. 816 ff.), the first three volumes of the lectures delivered at the Hague Academy of International Law at its session in 1925 were reviewed. The two present volumes contain the remaining lectures delivered at that session. The three volumes already reviewed contain the lectures of 15 professors representing nine different countries. The present volumes contain the lectures of eight others: MM. Benoist, Gidel and Luchaire of France; Lewald of Germany; Fedozzi of Italy; De Cock of Belgium; Saldana of Spain, and Healy of the United States. The subjects treated by three of them fall within the field of private international law, one in the field of education, and one perhaps in the field of political theory. In the field of private international law were the lectures of Dr. Hans Lewald on questions of inheritance, Professor Healy on "the general theory of public order" and M. De Cock on the effects and execution of foreign judgments. Dr. Lewald discusses the diversity of existing rules governing inheritance (*successions*) and the efforts that have been made at the various conferences on private international law at The Hague to agree upon uniform conventions. Professor Healy's lectures cover somewhat the same field, but deal in a more general fashion with the whole subject of conflict of laws, the desirability of uniformity of rules, the efforts that have been made to obtain uniformity, possible "ameliorations" of the existing situation, etc. Dr. De Cock's lectures on the effects and execution of foreign judgments review the diverse practice of different countries and the efforts of the Institute of International Law and of the various conferences that have been held to bring about agreement upon a uniform policy. He proposes three different solutions for dealing with the problem.

Professor Saldana's lectures on international criminal justice constitute a veritable treatise of more than 240 pages on the subject, and, in the opinion of the writer, it is the most valuable discussion of the subject that has been made. He considers in turn the historical development of the idea of international criminal justice, the various forms of international crime, the methods and instrumentalities of international crime, the proposals for the establishment of an international criminal court and the criminal jurisdiction of the existing Permanent Court of International Justice. As an appendix, he submits a draft of an *avant projet* of an international penal code.

M. Charles Benoist, the veteran French deputy and political writer, discusses in 175 pages the influence of the ideas of Machiavelli, especially upon

* The JOURNAL assumes no responsibility for the views expressed in signed or unsigned book reviews or notes.—ED.

the doctrine and practice of the law of nations. M. Benoist, it may be recalled, is the author of an important work entitled *Le Machaviélisme* published in 1907. One feature of his lectures is an extensive collection of "Machiavellian maxims," gathered from the writings of the great Florentine. Those which are of interest to the student of international law relate to such matters as conquest, occupation, treatment of conquered countries, destruction of cities, the causes and usages of war, the faith of princes, respect for treaties, etc. He discusses in turn four great "Machiavellian types": Richelieu, Frederick the Great, Napoleon I, and Bismarck, although he frankly confesses that this brief list is not exhaustive.

M. Luchaire, in his lectures on the principles of international intellectual coöperation, considers especially the essential conditions of intellectual life, the forms and character of intellectual achievement, the effect of the World War upon scientific and intellectual progress, and the problem of the amelioration of the conditions of intellectual labor.

M. Gidel's lectures deal with the rights and duties of nations. He accepts the usual classification of fundamental rights as those of conservation, independence, equality, respect and international commerce. As to the doctrine of the equality of states, he points out that it is the essential base of international law, but he does not overlook the serious consequence it has had on the effort to organize the world for the promotion of common interests. Unfortunately Professor Gidel's lectures as printed in the *Recueil* contain only the historical introduction to his course. We are told, however, that the whole will ultimately appear in a separate volume which he contemplates publishing.

Probably none of the lectures published in the five volumes of the *Recueil* for 1925 are of more current interest or value than those of Professor Fedozzi on the juridical status of merchant vessels. They make a treatise of 220 pages in which he considers in the light of the legislation, the jurisprudence and the practice of different states the status of ships employed in the public service, of state-owned vessels employed in commerce, of refugee ships in foreign ports, pleasure yachts and other craft, the nationality of vessels, the legal nature and extent of the territorial sea, the right of pursuit on the high seas, maritime police, criminal jurisdiction over vessels, etc. His treatment shows evidence of intimate familiarity especially with the legislation and judicial decisions of the various countries.

In respect to the points discussed it may be said that, on the whole, the lectures contained in these two volumes set a high standard. Most of them bear evidence of having been prepared with care and on the basis of extensive research. For the student of international law their value will naturally vary, for the reason that some deal much more with questions of practical interest than others. Taking the five volumes for 1925 as a whole, they constitute an important contribution to the literature of international law.

J. W. GARNER.

The Rhineland Occupation. By Henry T. Allen, Major-General, U. S. A. Indianapolis: The Bobbs-Merrill Co., 1927. pp. 347. Index. $5.00.

As so justly said in the cover notice, "the commander of the American Forces in Germany and the American Representative on the Rhineland High Commission here presents his report to the American people." General Allen was in command of the American forces in Germany from July 8, 1919, five days after their official designation as such, until January 24, 1923, when for the last time the American flag was lowered from the historic Fort Ehrenbreitstein on the right bank of the Rhine at Coblenz and the last American forces departed from Germany. General Allen was also the American representative on the Interallied Rhineland High Commission from May 21, 1920, to February 6, 1923, succeeding Mr. Noyes who had served as American representative from the institution of the High Commission on January 10, 1920, and previously in a similar capacity on the Interallied Rhineland Commission. With General Allen's withdrawal American participation in the work of the High Commission ceased. Prior to July 3, 1919, the American forces in Germany had consisted of the Third American Army of the American Expeditionary Forces under the command first of Major-General Joseph T. Dickman and then of Lieutenant-General Hunter Liggett.

The Treaty of Versailles had been signed on June 28, 1919, ten days before General Allen took command of the American forces, so that peace at that time was assured. However, problems of the greatest moment for the future peace not only of Europe but of the world, remained to be solved and in the solution of these problems General Allen took an effective and distinguished part. His situation was rendered the more difficult by the failure of the United States to ratify the Versailles Treaty. Until the conclusion of peace, the occupation of German territory was necessarily a military occupation under the rules of international law and the terms of the armistice. After the conclusion of peace, the occupation was to be regulated by The Rhineland Agreement, signed at Versailles the same day as the Peace Treaty, the fundamental principles back of which, as suggested by Mr. Noyes, were that there should be as few troops as possible, concentrated in barracks or reserve areas, with no billeting except for officers, and German authority and administration left unimpaired, with the exception of a civil commission authorized to make regulations whenever German law or actions should threaten the carrying out of treaty terms or the comfort or security of troops, and in case of emergencies to authorize martial law. This idea of a civil commission representing the governments instead of a military commission representing the armies was embodied in The Rhineland Agreement which General Allen calls "the Magna Charta of the High Commission."

The advantages to the cause of peace in this civil government over the military occupation under the terms of the armistice were very great, but as neither the Peace Treaty nor The Rhineland Agreement was ratified by the

United States, the American forces continued their occupation technically under the terms of the armistice until the exchange of ratifications of the special peace treaty on November 11, 1921. In fact, however, General Allen published most of the ordinances of the High Commission as military orders within the American area and the spirit of The Rhineland Agreement was carried out in that area more thoroughly probably than in any other. With the occupation of the Ruhr the American forces were withdrawn from the Rhineland to the regret of Allies and Germans alike.

The first ten chapters of General Allen's work are taken up with various phases of the strictly military occupation of the earlier period, the rest of the volume with the phases of what was in effect a civil occupation under The Rhineland Agreement and the High Commission. Notable chapters in the first part are "The March of the Third United States Army into Germany," "The Relations between the Army and the Population," and "A Farther Advance into Germany." Much of the rest of the first ten chapters deals with the machinery by which the manifold problems of the armistice and of the military occupation were carried out and is of special value to the technician in military occupation.

The last twelve chapters and the related appendices deal with the period of the High Commission and are an invaluable personal contribution to the history of this critical period of post-armistice reconstruction. The American representative had the confidence of both the Allied and German representatives on the High Commission and in addition an intelligence service much more comprehensive than the limited forces under his command would have ordinarily warranted. He was the eyes and ears of the American Government. But he was much more than this. The failure of the United States to ratify the Versailles Treaty and the political situation which had been responsible for that failure made it difficult for the Administration to take any definite stand as to the Rhineland occupation which would not be the subject of severe attack. Accordingly General Allen was left a free hand. "It was a task for all a man had of delicacy and fortitude," and he proved equal to the task.

The limits of this review do not permit a discussion of the many interesting incidents that arose. A constant threat was the determination of the French military party to have security even to the extent of separating the Rhineland from the German *Reich*. The chapter on "The Separatist Movement" is one of the most interesting in the book. Of especial interest to international lawyers will be Appendix IV on "Black Troops." Much of what appeared in the press as to excesses committed by them was typical war propaganda.

This work does not take up the lighter side of General Allen's life on the Rhine nor the problems concerning his own command which are covered in his previous book, *My Rhineland Journal*. The story is impersonally and modestly told, but it discloses another of those internationally-minded Amer-

icans of whom the American army and the American people have every reason to be proud.

PERCY BORDWELL.

The Study of War for Statesmen and Citizens. Lectures delivered in the University of London during the years 1925–1926. Edited by Major-General Sir George Aston, K. C. B., Lecturer on Military History, University College, University of London. With Introductory Address by The Right Hon. Viscount Grey of Falloden, K. G. London and New York: Longmans, Green & Co., Ltd., 1927. pp. 205. $3.75.

This volume comprises lectures on land, sea, air and chemical warfare, delivered to audiences of public men at the School of War Studies established in 1925 at the University of London. Four were prepared by such outstanding authorities as Admiral Richmond and General Ironside. Their views are doubtless those of the ministries and general staffs which they represent.

Admiral Richmond gives a clear exposition of general principles, especially on two controversial topics, capture of private property and the question of the capital ship. He shows that the capture of private property is not mere piracy, but is intended to stop the movement of enemy commerce which enables the enemy to fight. This loss to allied commerce was far greater than the value of captures by the *Emden*. He analyzes the functions of the surface, submarine and supermarine elements of a navy, differentiating the capital ship not by its size but its function. He concludes that England must never surrender her power of "trade attack" and thereby lose her power of investment; and that despite the airplane and submarine, naval victory will be decided by the surface ship. His views should be studied by all interested in naval limitation.

General Ironside concludes that the next great war will be fought by small highly trained armies. Until the next war decides it, this will remain a highly controversial question. The conclusion can be based only on the assumption that a "great" war can be confined to the two nations which begin it. The vast complexity of modern international relations of all kinds makes this almost an impossibility. The age of the international duel between small highly trained armies is not likely to return, because modern wars are no longer quarrels between rulers but between peoples.

Both these authorities combat the extreme view as to obtaining a final decision by bombing enemy resources from the air. Naturally, the British Air Vice-Marshal, using arguments with which all are familiar, attaches greater importance in the final decision to this method. The next war, which they all expect, may show which is right. The same may be said of the discussion of chemical warfare. Its proponent does not believe that this method can be prevented in war, and concludes that "The same forces that may produce war will lead to the employment of gas."

The addresses of Lord Grey and General Aston strike the keynote of these

studies and of the purpose of the School of War Studies in London. This to give civilians who may be charged with responsibility of government in war such knowledge of the general principles of warfare as may prevent great mistakes often made by governments, notably in the last war, in military and naval strategy; such mistakes as the disastrous Gallipoli adventure and the wasteful use all over the world of a large part of 3,600,000 British troops whose presence was so much needed on the Western front where all the stakes of the war were being played for. For his share in these, Lord Grey manfully shoulders his responsibility, while he graciously refrains from the *tu quoque* that he might have addressed to some of his colleagues, both national and allied.

TASKER H. BLISS.

Curso de Derecho Internacional Privado Americano. By Cecilio Báez. Asunción: Imprenta Nacional, 1926. pp. 157.

Dr. Báez, whose long and distinguished career as a diplomat and jurist has given him an enviable reputation throughout the western hemisphere, would have added much to the International Commission of American Jurists which met recently at Rio, for he had been chosen as one of the delegates of Paraguay. He was unfortunately prevented from attending the conference where no doubt he would have elaborated many of the ideas expressed in this summary of American Private International Law, for to this jurist there is an *American* body of law on this subject, the distinctive feature of which is the territorial law. Adopting the ideas of Savigny and Jitta, Dr. Báez denies "legal strength to the principle of nationality, and to that called the *jus sanguinis:* the subject of the law is *man,* whatever his origin; consequently the organizing principle of the international juristic community is the *jus humanitatis.*" It must be confessed that Dr. Báez makes a good case for this thesis, which produces a synthesis of the apparently conflicting claims of the international juristic community and of the territorially sovereign state. If each of the twenty-one republics of America had a system of law based upon this fundamental conception, the realization of a true international juristic community would be almost at hand. However, more than half of the states of America have a system based on nationality, and neither group (as was demonstrated at Rio) seems willing to yield to the other. The problem is still to discover a formula which will reconcile the two principles.

After an historical review of the development of the science of private international law, Dr. Báez addresses himself to the Montevideo conventions, and his work is mainly a commentary upon these treaties, which are, he says, "the realization of the humanitarian aspirations" of its signatories, and lay the foundation of the legal structure of the future. In this brief essay Dr. Báez proves himself to be an able advocate of the doctrines which have been adopted by the country of which he is a distinguished representative.

JESSE S. REEVES.

International Law. By the Right Hon. the Earl of Birkenhead. 6th ed. edited by Ronw Moclwyn-Hughes. London and Toronto: J. M. Dent and Sons, Ltd., 1927. pp. xxvi, 460.

In his preface to the fifth edition reprinted in this volume, the author (who then, 1918, signed himself Frederick Smith) tells us that this book began its existence as a volume in Dent's Primer Series in 1899. New editions were called for in 1902 and 1906. In 1911 the book was revised and enlarged by J. Wylie, barrister at law. It then contained 391 pages. In 1918 we had a new edition by Coleman Phillipson, a well-known British publicist. Now we have a sixth edition edited by Ronw Moclwyn-Hughes, barrister at law.

The book has thus grown from less than 200 to 460 pages within a generation. It is impossible to say what portions of the work are to be attributed to the Earl of Birkenhead himself and which to his various editors. In the preface to the fifth edition, Mr. Smith assured us that in the fourth edition he was "consulted upon all additions to the original book; I made some of them myself; and I retained responsibility for the opinions expressed." In the preface to the present or sixth edition the Earl of Birkenhead merely praises the "industry and discrimination" of his new editor and expresses his gratification over the fact that the book "continues successfully to maintain its position in a branch of public jurisprudence upon which so many competent works have appeared in the same period." If the work is to be regarded as an authority, to whom is credit to be given?

By comparing the fifth and sixth editions, it will be seen that they are approximately of equal size, 456 and 460 pages, respectively, of which somewhat over one-third (176 and 185 respectively) are devoted to the law of peace and somewhat less than two-thirds to the so-called laws of war and neutrality. Are we to infer that this proportion, which reverses the normal tendency of publicists within recent years, indicates the relative importance of the law of peace and war in the Earl's mind?

By further comparison of the two editions, it may be noted that the present edition contains two new chapters—one on the League of Nations and one on the Permanent Court of International Justice. The chapter on the League, consisting of eight pages, gives a fair idea of the objects of the League, the duties of the Secretariat, the International Labor Organization, the protection of minorities, the League's work in Austria and Hungary, and the status of the League. But it does not show a proper sense of the importance of the League in international law or in international relations. The chapter on the Court of International Justice is one of the best in the book, which is perhaps not saying a great deal.

In his preface to the present edition, the Earl says that "it has become necessary largely to rewrite, in view of the experience of the Great War, the chapters on blockade and contraband." These chapters, which are perhaps the best in the book, have been revised to some extent, but a comparison

between the fifth and sixth editions will show that they have in no real sense been rewritten. It would certainly be very interesting to have the Earl of Birkenhead's opinions on these very interesting and important subjects, but what assurance do we have that the views expressed in these chapters are his in the sense that he has really applied his acute mind to the consideration of these matters?

It would also be very interesting to know whether the Earl still maintains the fierce anti-German attitude expressed by him in the preface to the fifth edition. Apparently he does, since he reprints this preface without indicating dissent. If so, how can we be sure that "an attempt has been made to estimate war-conduct in a spirit unaffected by war bias," as claimed by the Earl in his preface to the sixth edition?

It is hard to see what useful purpose this book can serve. In its original form as a primer, it doubtless had some value as a very elementary text. It might still be claimed that it has such value if it were not for the fact that it has largely ceased to perform this function. Of course, it may still have some value as an abridged text, but entirely too much abridged so far as the law of peace is considered. For example, there are only eight pages on the rights and privileges of diplomatic agents and four pages on consuls and consular jurisdiction. There are some keen discussions and observations which, however, could hardly be regarded as elementary, as, *e.g.*, on the right of self-defence and self-preservation, and military necessity (pp. 79–81 and 221–22); but there are too many omissions, and there seems to be such a lack of a sense of proportion and relative values that it could not be deemed an adequate text for college use. It is neither fish nor fowl, neither light food for babes nor strong meat for adults.

AMOS S. HERSHEY.

Die Organisation der Rechtsgemeinschaft. By Walther Burckhardt. Basel: Verlag Helbing und Lichtenhahn, 1927. pp. xvi, 463. Index. Fr. 22.

Mr. Burckhardt, professor of public law at the University of Berne (Switzerland) and author of a number of outstanding publications, presents here an original contribution on the nature of private, public and international law. In the first part of his book, Professor Burckhardt discusses the distinction between public and private law. This differentiation is particularly important for continental Europe where, as a general rule, different courts and different procedures must be appealed to in controversies of the one or the other kind. The author's formula for the difference between private and public law centers around the difference between *zwingendes Recht* (mandatory statute) and *nichtzwingendes Recht* (directory statute). A discussion on vested rights and the gaps in the law concludes the first part of the book.

The following chapters are an investigation into the nature of state organization and the function of the state as lawmaker and law enforcer. The last part of the book deals with the nature of corporations in private and public

law, the community of nations, and the nature of international law. It ends with a contribution to the complex problem of responsibility of corporations and the state according to municipal law, and the responsibility of the state and individuals in international law.

The work represents in many respects a new approach to the topics discussed, and the theories are developed with a keen logic and penetrating analysis, characteristics also of the earlier publications of this eminent Swiss jurist. The style is, however, heavy. A good acquaintance with the technical terms used in Continental jurisprudence is necessary to draw full benefit from this German work.

Burckhardt's theories are most interesting. As far as international law is concerned, the author concludes that in this field no contrast can exist between the law that is (*positives Recht*) and the law that should be (*richtiges Recht*). Burckhardt denies the existence of "positive law" in this field, that is as regulating interstate relations. He, however, does not deny the existence of law as dominating the community of nations, but he points to the natural law (*richtiges Recht*) as exclusively binding. This is just one example of Burckhardt's interesting findings. They deserve to be read in their full text.

This book will provoke the opposition of many well-established schools. No one, however, interested in the philosophy of law, will read this valuable contribution to juristic science without great interest and benefit.

MAX HABICHT.

The World Crisis, 1916–1918. By the Rt. Hon. Winston S. Churchill, C.H., M.P. New York: Charles Scribner's Sons, 1927. Two volumes: xvi, 302; x, 319. Index. $10.00.

Continuing the narration contained in *The World Crisis, 1911–1914*, and *The World Crisis, 1915*, Mr. Churchill, who served as First Lord of the Admiralty (1911–15) and as Minister of Munitions (1917–18), now offers the world these concluding volumes, deeming it of interest, he writes, "to record before they fade the impression and emphasis of various episodes, so far as I was personally able to appreciate them." "Such a method," he says, "is no substitute for history, but it may be an aid both to the writing and to the study of history."

So clear, so frank and so modest a statement of the writer's estimate of his own work totally disarms the critics. There is no consistent *point d'appui* for an attempt to refute or correct Mr. Churchill's statements. Being avowedly a record of personal impressions, the right attitude toward it is to listen to the author's recital with the attention and interest to which his close intimacy with the events described and with the persons responsible for their occurrence entitles him.

This contact was very close at all points of the Great Crisis, and for the future historian this fact is of great value; for while it leaves him free to con-

sider with equal attention the impressions of other writers, it supplies him with valuable materials, not available from other sources, supported by the authority of one who was in many matters not only a personal witness but in some instances an actor and even an initiator of policy. This book is, therefore, to be placed alongside the *Genesis of the War* by Lord Oxford, the *Twenty-Five Years* of Viscount Grey, and the account of England's preparation for the crisis in Viscount Haldane's *Before the War*; which, taken together, constitute a very complete presentation of Great Britain's part in the great conflict.

Mr. Churchill's reference to his book as one of "impression and emphasis" should not lead to the conclusion that these volumes are wanting in objectivity of subject-matter. On the contrary, there is in these volumes a constant appeal to facts and figures, with many maps and tables of statistics, especially with reference to military affairs, in which the author shows a deep interest and regarding which he does not hesitate to challenge the views of the highest military authorities regarding the conduct of the war. Elaborate proofs are assembled in the text to establish the correctness of his generalizations on this subject, especially to sustain his conclusion that the policy of "attrition," as applied by Joffre and defended by Sir William Robertson, was a costly error. While he pays a high tribute to the talents of Sir Douglas Haig, Mr. Churchill finds no reputation greatly enhanced by the events of the conflict. "The Great War," he writes, "owned no Master; no one was equal to its vast and novel issues; no human hand controlled its hurricanes; no eye could pierce its whirlwind dust clouds."

The war in general Mr. Churchill divides into three phases, distributed in three time-periods: the First Shock, 1914; the Deadlock, 1915, 1916, 1917; and the Final Convulsion, 1918. It is with the second and third of these phases that these volumes are chiefly concerned and each of them is graphically depicted.

Throughout his work the author devotes much attention to naval affairs with which his official experience gave him great familiarity. Of the Jutland naval battle the author writes with skill and insight. It is perhaps for the general reader the most intelligible account of the conditions of this engagement and of the encounter itself.

To Americans the ninth chapter of the first volume, on "The Intervention of the United States," is of special interest.

> If the Russian revolution had occurred in January instead of in March, or if, alternatively, the Germans had waited to declare unlimited U-boat war until summer, there would have been no unlimited U-boat war and consequently no intervention of the United States. If the Allies had been left to face the collapse of Russia without being sustained by the intervention of the United States, it seems certain that France could not have survived the year, and the war would have ended in a Peace by negotiation, or in other words, a German victory.

The following passage sums up Mr. Churchill's view with regard to a "sequence" in which he discerns "the footprints of destiny":

> The total defeat of Germany was due to three cardinal mistakes: the decision to march through Belgium regardless of bringing Britain into the war; the decision to begin the unrestricted U-boat war regardless of bringing the United States into the war; and thirdly, the decision to use the German forces liberated from Russia in 1918 for a final onslaught in France. But for the first mistake they would have beaten France and Russia easily in a year; but for the second mistake they would have been able to make a satisfactory peace in 1917; but for the third mistake they would have been able to confront the Allies with an unbreakable front on the Meuse or on the Rhine, and to have made self-respecting terms as a price for abridging the slaughter. All these three errors were committed by the same forces, and by the very forces that made the military strength of the German Empire. The German General Staff, which sustained the German cause with such wonderful power, was responsible for all these three fatal decisions. Thus nations as well as individuals come to ruin through the over-exercise of those very qualities and faculties on which their dominion has been founded.

It was the American intervention then, according to this writer, that finally consummated the defeat of Germany, and he lays stress on this statement. In some lucid passages he narrates in detail the progress of American reflection on the nature and meaning of the war, in which he holds President Wilson personally accountable for the delay of action. Very dramatic is the recital of how and why the decision to enter the war was finally reached.

Although, as he recognizes, "at the end of the war more than 2,000,000 American soldiers were on the soil of France, the physical power of the United States was never fully applied, or even in any serious degree, to the beating down of Germany. By 1920 there would have been 5,000,000; but if only a few score thousand Germans fell by American hands, the moral consequence of the United States joining the Allies was indeed the deciding cause in the conflict."

What was it then that really ended the war? Was the German defeat only a "moral consequence"? The chapters on "The Unfought Campaign," "The Turn of the Tide," "The Teutonic Collapse" and "Victory," which conclude the second volume of this final installment of Mr. Churchill's work, are an attempt to answer this question.

As to the proportions of men and munitions in September, 1918, he says:

> The American War Department now aimed at placing in the field eighty divisions, numerically equal in infantry to two hundred British or French divisions, by the end of June, 1919. The rate at which American troops were landing in France was already far ahead of their munitions programme. They hoped to have forty-eight divisions in France by the end of 1918. The transformation of their industry was still incomplete, and they could only arm from American sources a fraction of

> the men they were devoting to the struggle. Armies of eighty divisions required nearly 12,000 guns of various natures, with an unceasing flow of ammunition thereafter. Towards this the United States could not count on supplying more than 600 medium and heavy guns and howitzers. They could however provide the material out of which the immense established gun plants of France could make 8,000, and those of Britain 3,000 pieces. By the adoption of a proportion of the British pattern, all the American and Canadian factories which we had hitherto used could be made immediately available for United States needs, both in guns and ammunition.

As to the general situation after the Battle of Noyon (June, 1918), he says:

> The Americans were pouring in across the open seas. Italy, so nearly extinguished in the preceding winter, renewed her strength. Meanwhile from every quarter dark tidings flowed in upon Great Headquarters. Turkey was desperate. A sinister silence brooded in Bulgaria. The Austro-Hungarian Empire was upon the verge of dissolution. A mutinous outbreak had occurred in the German Navy. And now the valiant German Army itself, the foundation and life of the whole Teutonic Powers, showed disquieting symptoms. The German nation had begun to despair, and the soldiers became conscious of their mood. Ugly incidents occurred. Desertion increased, and the leave men were reluctant to return. The German prisoners liberated from Russia by the Treaty of Brest-Litovsk returned infected with the Lenin virus. In large numbers they refused to go again to the front. A campaign of unmerited reproach was set on foot against the German officer class.

But it was not these conditions that determined the conclusion of the war. As Mr. Churchill shows, Germany was beaten in the field, and he does not disparage the American contribution to this result. With a vividness that enthralls the reader, he tells the story of the last great battles. He pictures at the same time the utter collapse of the Central Powers in the East, "the explosion of revolution in the most disciplined and docile of States," and the hasty flight of the defeated Supreme War Lord.

It is a large canvas that is spread before us in these volumes, full of action, crowded with moving figures, a world drama painted in brilliant colors. Whatever may be the estimate of future historians of a less temperamental school, *The World Crisis* will hold a permanent place among the contemporary records of the Great War. Its eloquence, its sincerity and its frequent touches of magnanimity in the midst of relentless judgments of what this book regards as error in the conduct of the war, disclose to us how unreservedly Winston Churchill, in the face of bitter criticism of his course as First Lord of the Admiralty, threw his whole being into the terrible struggle which he has so dramatically described.

DAVID JAYNE HILL.

Le Problème du Pacifique. By André Duboscq. Paris: Librairie Delagrave, 1927. pp. 126. Map. Index.

This small volume is the thirteenth from the pen of this author, of which seven deal with political questions covering Hungary, the Mediterranean littoral, the Near East, and three upon the extreme Orient. On this phase of world affairs Duboscq has written upon *The Evolution of China;* then *China Face to Face with the Powers;* and now his latest volume upon the *Problem of the Pacific.* These three form apparently part of an attempt to lay before the French public and students of international affairs a synthetic evaluation of the situation in the extreme Orient, together with his conception of the Russian, the British and the Colonial Powers' policies and aims in this vast area.

The book is marred by the giving of quotations for which the author has not troubled in certain cases to give any reference (*vide* pp. 6, 46, 52, 53, 61, 65, 69 *et seq.*). These, though unsupported, may serve as a slight indication of the possible tendency of opinion in France upon Oriental affairs. He commences with a reference to the utterance of the late President Roosevelt regarding the "Dawn of the Pacific Era" in the world's history, a view which the author thinks has been abandoned as a vision by modern American politicians under pressure of the *sequelae* of the world war and the Washington Conference. The chapters dealing with Russian and British policies are not convincing, except in so far as he visualizes Soviet Russia as attempting to adopt certain forms and methods of the late Tsarist régime in Asia. In the author's opinion, there is a possibility that, in the final analysis, there will develop in the extreme Orient a position in which Soviet Russia and the United States will find themselves as antagonists, being the representatives of two opposing principles of government, the prize in each case being the trade of China and its development.

The author realizes that the international position of Japan has undergone much change since the World War, due to several causes, one of which was the breaking up of the Anglo-Japanese alliance and the results of the Washington Conference; but does not appear to appreciate that these events leave Japan free to choose any other form of alliance which the international movements of today or tomorrow indicate as being useful to her position or policy as a leading Asiatic Power. Omissions in the book indicate that the author is not fully posted with events leading up to the opening of Japan. For instance, on page 22 and following, when discussing the formal documents of arrangements between Japan and Western Powers, no mention is made of the visit of Admiral Sterling to Japan in the autumn of 1854 when he negotiated the Convention of Nagasaki with the Governor, who had as an adviser a Metsuke or Japanese censor.

As a serious contribution to this problem the book adds little to the sum of human knowledge. But as a possible indication of certain movements of French opinion, it is interesting.

W. B. CARPENTER.

Frankfurter Abhandlungen zum Kriegsverhütungsrecht. Herausgeber: Prof. Dr. F. Giese und Prof. Dr. K. Strupp. No. 1. *Die Fortbildung der internationalen Schiedsgerichtsbarkeit seit dem Weltkrieg.* By Hans Wilhelm Thieme. pp. 85. No. 2. *Die Fortbildung der internationalen Schiedsgerichtsbarkeit seit dem Weltkrieg besonders durch den Locarno-Pakt.* By Paul Kaufmann. pp. 77. No. 3. *Die völkerrechtliche Garantievertrag inbesondere seit Entstehung des Genfer Völkerbundes.* By Dr. Otto Bussmann. pp. 66. Leipzig: Robert Noske, 1927. Rm. 5 each.

These essays, which deal with the progress and development of international arbitration since the War of 1914–1918, are apparently the first of a series on the subject of the prevention of war. The editors, Dr. F. Giese and Dr. K. Strupp, say in their introduction that these essays are the fruit of their efforts during years past to direct their students in the elaboration and recasting of this phase of the law of nat s.

In the first essay Dr. Thieme treats the League of Nations and the provisions of the Covenant which aim at the prevention of war; international justice and international arbitration; international arbitration and sovereignty; arbitration treaties; and the Geneva Protocol. The whole essay covers only 85 pages, but in this short space the author succeeds in giving a fairly satisfactory sketch of the history of arbitration since 1918 and in analyzing carefully the factors involved.

In the second essay the author, Paul Kaufmann, discusses the arbitration provisions of the Locarno Treaties and compares them with those contained in the Covenant of the League. He sees in the Locarno Treaties a real gain for the cause of arbitration.

The third essay deals with international treaties of guaranty, particularly those treaties made since the founding of the League of Nations. The author devotes 66 pages to a very keen and searching analysis of the whole question. This essay, and the others in the series, constitute a valuable contribution to the literature of this subject. It is to be hoped that the law faculty of the University of Frankfort will continue this series of publications.

HOBART R. COFFEY.

Prize Law During the World War. A Study of the Jurisprudence of the Prize Courts, 1914–1924. By James Wilford Garner. New York: Macmillan, 1927. pp. xlviii, 712. Index.

High praise is due Professor Garner for undertaking the very difficult task of collecting the reported decisions of prize courts of the belligerent countries, many of which have not been published in complete form, as well as for digesting and bringing together in one handy volume the results of these decisions. Professor Garner states:

> During the World War special prize tribunals were organized, or existing courts designated and authorized to exercise jurisdiction in

matters of prize, in Austria-Hungary, Belgium, China, France, Germany, Great Britain, Italy, Japan, Roumania, Russia, Portugal, Siam and Turkey. From first to last these tribunals rendered not less than fifteen hundred reported decisions, besides a large number of other decisions which were never reported. No war of the past ever produced so extensive an output of prize jurisprudence. It deals with every question of international law that had been the subject of adjudication by the Prize Courts during former wars and in many cases old questions were presented under new and sometimes novel forms. Likewise, the Prize Courts were called upon to decide many new questions that had never before been the subject of adjudication, and consequently concerning which there were no exact precedents for the guidance of the courts.

In the beginning the author covers the function and organization of prize courts, their jurisdiction and procedure. Then follows a chapter on the law applied by prize courts, in which the author discusses, among other things, the Hague Conventions, the Declaration of London, and the Declaration of Paris. The "solidarity clause" of the Hague Conventions raised a difficult question in the last war which future international conventions dealing with warfare should settle. In the same chapter the author discusses the position of customary international law, the weight given to opinions of text writers and jurists, and the doctrine of *stare decisis*, and the theory of changed conditions. Finally, the author takes up the subject of whether prize courts apply international law or municipal law and which law has precedence, in the view of the courts of different countries.

The chapter on the right of capture in maritime war deals largely with the place of capture, that is, whether the prize is captured on the high seas, in port, on inland lakes, neutral waters, etc. and whether captures may be made by land forces or port authorities as well as by naval forces. The case of the *Appam*, sent into Norfolk under a German prize crew, is well covered at the close of the chapter.

The following two chapters cover the subject of vessels exempt from capture—fishing vessels, hospital ships, small boats in local trade, refugee ships, cadet ships, and Belgian relief ships. Sir Samuel Evans held that deep sea fishing vessels engaged in a commercial enterprise which formed part of the trade of Germany were liable to capture and condemnation. He limited the exemption to fishing vessels plying the industry near or about the coast. It is interesting to observe the German decision as to the Belgian relief ship *Haelen* which was held lawfully captured in the German war zone on the ground that its safe conduct prohibited it from navigating this zone. Under the same heading of exempt ships the author discusses ships in port or entering port at the opening of hostilities, ships entering port or encountered at sea in ignorance of hostilities and refugee ships in port. The author touches upon the question of the seizure of refugee enemy vessels by the United States and certain other countries without putting them through a prize court. The United States under a joint resolution of Con-

gress of May 12, 1917, seized a large number of German vessels lying in American ports and partly wrecked by order of the German Government. The author upholds this procedure (p. xliii). It is interesting to observe that British prize courts withheld judgment in certain cases of merchant vessels in port at the outbreak of war, and issued "Chile orders" which involved the detention of the vessel under the control and jurisdiction of the court and subject to its further order, the Crown being at liberty to apply to the court for a further order of condemnation. If the ship was lost during the period of hostilities, the government was not responsible.

The capture of enemy private property at sea is taken up in Chapter VIII. It is well established that enemy private property at sea is good prize, and various cases during the World War affirm the ancient rule of confiscability in such cases. The author here takes up the exceptions to the rule. The rule of the Declaration of Paris of 1856 that neutral ships make neutral goods was also upheld by the prize courts with the modification that the rule did not protect enemy goods seized on a captor's vessel or a vessel of the captor's ally. In short, the rule covered enemy goods only when actually under the neutral flag, according to the British decisions, although the French adopted a less rigorous view. Consequently, enemy goods transshipped from an enemy to a neutral vessel are not protected by the rule, nor are enemy goods under a neutral flag, if "infected" by the presence of contraband. Other departures of the rule are also discussed, particularly those due to the reprisal or retaliatory measures of the belligerents, such as the British Orders in Council, ending with that of February 16, 1917, issued in retaliation against the German War Zone Decree of February 1, 1917. Sir Samuel Evans upheld these measures, as did also the Judicial Committee. The right of retaliation is a right of the belligerent and not a concession by the neutral. Consequently a neutral is not entitled to compensation for the inconvenience suffered. The author summarizes the arguments *pro* and *con* by various writers regarding the legality of such retaliatory measures, and urges that the matter should be regulated by international agreement in future revision of the laws of war.

In this chapter, the author also takes up the interpretation of Article 3 of the Declaration of Paris—neutral goods under enemy flag are exempt from capture, and shows how Article 3 was applied by the prize courts of the various nations. It is interesting to note that the German and Austrian prize courts held that the owner of neutral goods destroyed on an enemy ship was entitled to no compensation. This was, of course, in line with the German doctrine of "the necessities of war."

In Chapter IX, the author takes up the national character of ships, both under the rule of Article 57 of the Declaration of London before it was discarded by Great Britain and her Allies in the autumn of 1915, and subsequently under the rules of international law. The author considers when the flag is and is not conclusive as to nationality. It appears that the prize

courts let nothing, even the flag or Article 57, prevent their going back of the nominal ownership in order to ascertain who the real owners were. While the non-enemy flag was not regarded as conclusive as to the non-enemy character, the enemy flag, on the other hand, was held to be conclusive as to enemy character.

In closing the chapter, the author reviews the prize decisions on non-enemy interests in enemy ships, such as mortgages, liens, etc. The prize courts of both groups of belligerents seem to agree on the rule that all such interests follow the fate of the ship and are confiscated with it, which is the traditional English doctrine on the subject. The status of enemy interests in neutral vessels, however, is not clear-cut, and the decisions appear to be confused.

In Chapter X, the author takes up the transfer of ships to other flags. Articles 55 and 56 of the Declaration of London made a distinction between transfers of enemy vessels to neutral flag before the declaration of war and after the outbreak of war. Speaking broadly, the presumption is against the validity of transfers made after the outbreak of war, but this may be rebutted, whereas the presumption favors the validity of transfers made before the outbreak of war, which may also be rebutted. This should ordinarily become a question of good faith, but all of the prize courts did not so consider it.

Chapter XI, on the nationality of goods captured at sea, deals largely with the question of the determination of enemy character. The author points out that the Declaration of London leaves open the question of the test to be applied in determining neutral or enemy character of the owner of goods. The matter was therefore covered in prize regulations by the various belligerents. Those which made the nationality of the owner the sole or primary test were Germany, France, Italy, Japan and Russia. Among those which, on the other hand, adopted the rule of domicile were China, Great Britain and the United States. Great Britain and France, however, both departed in some degree from their traditional rules in this respect. After a general discussion, the author takes up the details of burden of proof, the status of mortgagees, pledgees and insurers, the distinction between commercial and civil domicile, the elements of commercial domicile, etc.

Connected with the nationality of goods captured at sea is the question of the passing of title under *ante bellum* contracts (Chapter XII), that is, whether the ownership had legally passed to the claimant at time of capture. This involved the interpretation of different kinds of contracts employed in maritime transactions. In determining the question of the ownership of goods at the time of capture under peace-time contracts, the prize courts generally applied the rules of municipal law. On the other hand, in determining the fact of ownership in the case of war contracts or contracts made in expectation of war, the prize courts applied prize law and not municipal law, and refused to recognize the validity of transfers of property which,

under the rules of municipal law, would have been valid transfers. In short, *bona fide* transactions which took place during peace were governed by ordinary municipal law, while transactions taking place during, or in imminence of, war were governed by the law of war. Various decisions on this question, as well as the interpretation of particular clauses in contracts, and the relationship of principal houses to their branches, are reviewed by the author. At the close of the chapter, the author takes up the enemy character of companies, that is the nationality of juridical persons, such as civil law partnerships, ordinary corporations, and so forth. During the course of the war it seems that the nationality of the legal entity was abandoned by some states and the nationality of incorporators or directors substituted. In this way the distinctions between different kinds of companies tended to disappear.

In Chapter XIII the author treats of contraband of war, on which he says the decisions run well into the hundreds and deal with every conceivable aspect of the subject. On account of the pressing need for foodstuffs and ammunition, the traffic in contraband reached an extensive scale. The facts of the situation also caused rigorous measures to be used. Germany, the principal belligerent on one side, had gateways for supplies through neutral states. It was practically impossible to distinguish between supplies intended for the civilian population and those intended for the armed forces on account of the system of government control of foodstuffs and other commodities. And many articles hitherto unadapted to military uses were now used extensively in the war, so that it was difficult to distinguish between absolute and conditional contraband. After a statement of these special circumstances, the author considers in detail the matter of absolute and conditional contraband, the doctrine of continuous voyages, contraband in the mails, and hostile destination in all of its refinements.

Chapter XIV continues the discussion of contraband of war with particular reference to the right and duty of search, and unneutral service. The condemnation of ships for carrying contraband, the element of knowledge on the part of the ship-owner or of the charterer or master are covered, as well as the immunity of a contraband carrying ship on the return voyage, the matter of ignorance of hostilities or of the contraband lists, the doctrine of infection, the right of visit and search, and the effect of unneutral service.

Chapter XV deals with blockade, which during the World War was a matter of first importance. The departure from existing rules and practice are noticed and examples of "regular blockades" are given. The blockade of certain neutral countries is commented upon. Besides the effectiveness of blockade, and the question of notice, the author gives considerable space to "irregular blockades," such as the German submarine blockade and the Anglo-French blockade of Germany.

The matter of indemnities and damages occupies the last two chapters of the book, and includes such questions as damages for seizure or detention,

losses due to the destruction of vessels and cargoes or deterioration of goods, claims for freight, and indemnities for seizure in neutral waters, as well as claims for interest, and so forth.

This review indicates the completeness of Professor Garner's work and the full references are mines of information for students and practitioners. This book will no doubt be the standard one-volume work on Prize Law for years to come.

L. H. WOOLSEY.

Recent Revelations of European Diplomacy. By G. P. Gooch. London and New York: Longmans, Green & Co., Ltd., 1927. pp. vi, 218. Index. $3.00.

The object of Professor Gooch is to acquaint his readers with the new literature dealing with the World War. He does exactly that without passion and without heat. The reader learns what he should consult and what to guard against even in the consulting. The *causerie* is most happily done and produces a certain amount at least of clarity and light in a somewhat turgid sea. Naturally, the conclusions of such a work are most likely to be challenged, but the author has rigidly restricted himself to plainly justifiable deductions from the generally accepted facts and produced an indispensable book characterized by simple directness of method that contrasts strongly with the bitterness and verbosity of the more extreme "revisionists."

Germany is held up as, at the worst, blundering but not criminal, by the German writers. Many of them do admit Germany's readiness to let Austria wage a "local" war to coerce Serbia; practically all deny that she intended to force a general conflict. Professor Gooch would leave intact the old theory concerning the Kaiser: "a disturbing factor in the life of the world" (p. 13). Germany may be somewhat rehabilitated, but not the Kaiser. The ineptitude of Austrian diplomacy is still more strikingly revealed (pp. 81–82, etc.). What is now made available heightens rather than lessens the blame hitherto attached to Austria. "The World War originated in the Near East," in "the quarrelsome Balkan family" (p.115). Herr Wendel might well receive more cordial recommendation to serious students; Miss Durham, less (pp. 119–120). "Macedonia was to the Bulgars what the Rhine Provinces were to the French" (p. 212). An analogy, a very rough one, would not be hard to find between the Bulgarian attitude toward Serbia and the Serbian toward Austria-Hungary. Jovanovich, however, should not be presented as trustworthy merely on points unfavorable to Serbia (pp. 118–119): Seton-Watson really wrote *Sarajevo*, not *Serajevo* (p. 119). Great Britain is impartially handled. The gentle chiding that is given to Sir Edward Grey is not unfair. Rumanian aspirations, quite as legitimate as the Jugoslav, prompted Bratiano in "putting himself up to auction" (p. 213). Bratiano went after "the apple of his eye," Transylvania, for similar reasons to those that impelled Italy to go after Venetia

instead of Rome in 1866. Spanish, Belgian and Italian writers apparently have given us but little more than what we knew before. One gathers that the new material has not painted France black, even if her garments are not spotlessly white. American writers on the World War, particularly Walter Page, House, etc., are given moderate mention.

"To explain the conduct of the statesmen of Europe in terms of national tradition or ambition is not necessarily to approve the policies from which the catastrophe arose" (p. 213). The material reviewed by Professor Gooch does go a long way toward giving us these explanations. One word of caution may not be out of place. "These performers who strutted across the stage" (p. 214) were all anxious to have their rôle recognized as even super-important. Unfortunately some of them were more conceited than scrupulous. Dororolsky, Pashitch, Isvolsky, Conrad von Hötzendorf (among others) struggle to prove their right to the center of the stage, however damaging to their reputation for morality, their revelations may be. But we do not necessarily have to believe them.

"The root of the evil lay in the division of Europe into two armed camps . . . and in the doctrine of the Balance of Power," states Professor Gooch (p. 213). Yet it must be suggested that even these explanations, wise and fair as they are, are not wholly adequate. The causes of the World War are not to be found so much in the overheated ambitions of European politicians as in the thoughts and hearts of Italians, Rumans, Czechoslovaks, Poles, Serbo-Croats, Bulgarians, etc., all striving or groping toward "self-determination" in language, culture and political control. Probably this book will be criticized for its cold impartiality between the interests of dynasties and the aspirations of peoples.

ARTHUR I. ANDREWS.

The Essentials of International Public Law and Organization. By Amos S. Hershey. Revised Edition. New York: The Macmillan Co., 1927. pp. xxii, 784. Index.

This is a thoroughgoing revision of a volume which has long enjoyed favor in courses on international law in our colleges and universities. Professor Hershey tells us frankly that it was not "until the dawn of Geneva and Locarno" that he acquired sufficient resolution to overcome his "temporarily weakened faith in the potency of international law" and to undertake the task of revision. He now believes not only that the "New World Order has secured a fairly firm footing, but that, mainly due to the agency of the League of Nations, International Law is passing through the greatest period in the history of its development." To one who has long awaited the present revision it is particularly gratifying to know that it has come about under such happy auspices. For indeed we stand on the threshold of great events, if only statesmen be equal to the task.

Perhaps no two scholars will agree as to the proper method and scope of

a textbook on international law. There are those who hold that the simplest approach to international law is the historical approach; that the record of international custom and treaties speaks in a sense for itself, that the duty of the textbook writer is merely to state the facts and let such conclusions be drawn as seem appropriate to the reader. At the other extreme are those who would reconstruct international law and present it as a more logical and consistent system, grouping the facts to fit in with their prearranged categories. Professor Hershey takes what is generally described as the "positive" attitude, keeping close to the realities of international life and using the language of the foreign offices without attempting to show the fallacies frequently involved in it. Occasionally he ventures an observation of his own, *e.g.*, that a certain practice should be the rule of international law, but for the most part he is concerned with presenting the existing system without criticism or comment. In the footnotes, however, are references to the views of more theoretical writers, and here the student can find material for building up a new system according to his individual conception of what is just and practicable between nations.

A number of interesting and useful changes have been made. Chapter V deals with "The Paris Treaties and After" and thus supplements the excellent history of international relations and law contained in the earlier edition. Another new chapter, XXIII, deals with the "Prevention and Solution of Differences through International Organization and Coöperation" and gives a convenient analysis of the organization and functions of the League of Nations, including, in a footnote, a description of the International Labor Organization and a summary of its activities. The revision of the chapter on "Amicable Means of Settlement of International Differences" naturally includes a study of the Permanent Court of International Justice.

In the interest of economy of space Professor Hershey felt it necessary to continue the method of the first edition in limiting the body of the text to the general principles or "essentials" of international law, and in relegating to footnotes the less important but more graphic details. This practice has the disadvantage of making the text much less readable than it might otherwise be, but it has the compensating advantage of making it possible to include in a single volume an amount of material which could easily have filled a two-volume work. Nowhere else, in so brief a compass, can one find such a wide range of information on international affairs and such numerous references to bibliographical and documentary sources. And there is the further advantage that the body of the text can be made to suit the needs of briefer courses on international law.

It would be easy to quarrel with Professor Hershey over some of the more or less dogmatic statements of principle contained in his text; but for the most part the true quarrel of the critic should be, not with the author, but with international law itself, almost every rule of which has need of greater clarification and more precise definition. The present volume is therefore

rather a call for a wider study of the subject in our colleges and universities. If the great task of codification is to be carried on to successful completion, it can only be done by the enlistment of leaders of public opinion in the ranks of the small group of scholars who are trying to develop our present international law into an effective rule of justice between nations. Those of us who have long been grateful to Professor Hershey for his text of 1912 must take this occasion to express our further gratitude for the revised edition.

C. G. FENWICK.

Das Recht der Minderheiten. (Materialien zur Einführung in das Verständnis des modernen Minoritätenproblems.) By Dr. Herbert Kraus. Berlin: Georg Stilke, 1927. pp. 365. Index. Rm. 10.

This is a collection of documents, mostly official, on minorities, appearing as No. 57 of Stilke's *Rechtsbibliothek*. In a short introduction Dr. Kraus states that he has collected those documents which he feels are of fundamental importance for an understanding of the modern minorities question. The volume is intended as a practical tool for scientific work and is limited to documents showing the development of minorities problems. No attempt is made at a complete collection. Included are the minorities provisions of the treaties made at the close of the World War with the Central Powers, the minorities treaties of the Principal Allied and Associated Powers with Greece, Poland, Rumania, Jugoslavia, and Czechoslovakia, six bilateral minorities treaties, eight outstanding League conclusions or resolutions, minorities declarations of Albania, Esthonia, Latvia, and Lithuania, and 28 more or less official declarations, resolutions or projects of private organizations, municipal appeals, regulations, and the like.

The treaty with Poland, which has been the basis of so many other treaties, is given in French, English, and German. Elsewhere French is the general rule, and German is used only where a document has been issued also in that language. A very few appear in English. All the footnotes, however, are in German, as are the notes appearing in the body of certain treaties, where, rather than quote full texts, variations from the treaty with Poland are noted. The documents are arranged chronologically, except for a few classed together in an annex. At the head of each document are indicated various places where it may be found; each document is fully footnoted to show its relationship with the others. These footnotes are not a commentary, but indicate historical material and give leads for further investigation. The volume contains complete indexes and a bibliography.

The work is done with thoroughness within the limits set by Dr. Kraus in the preface, and would seem to serve as a good introduction to the minorities problem, showing the kinds and sources of materials bearing on it.

LAVERNE BURCHFIELD.

Gaskrieg und Völkerrecht. By Dr. Josef L. Kunz. Wien: Julius Springer, 1927. pp. iv, 84. Rm. 4.80.

This book, dedicated to Dr. Dumba, former Austrian Ambassador to the United States, affords a brief survey of the relation of chemical warfare to international law, with special reference to two questions: first, the use of chemical weapons during the World War in violation of international law; second, the prohibition of chemical warfare in the future. Preliminary to the discussion of these questions, the author in the first chapter traces the evolution of gas warfare, showing, (1) its use during the World War, and, (2) its intensive development since the war. The second chapter discusses the use of gas warfare during the World War as regards its conformity to positive international law. The third chapter considers future prevention of chemical warfare. This question as analyzed includes: first, a historical synopsis covering the years 1919–1925, and, second, the position to be taken with respect to chemical warfare in the future. In the development of this situation the author directs attention to the strongly divergent schools of thought existing at the end of 1925 as regards the recognition of gas warfare by international law; the inclusion of war as a legal concept constituting a part of international law; the control or avoidance of war; and the international prohibition of gas warfare in the future. In conclusion the author expresses the opinion that future prevention of gas warfare must be by treaty, and he includes a treaty draft as a basis of discussion. The text is well supported with citations of authorities and a general bibliography on gas warfare.

HOWARD S. LEROY.

Private Law Sources and Analogies of International Law (with special reference to international arbitration). By H. Lauterpacht. London and New York: Longmans, Green and Co. Ltd., 1927. pp. xxiv, 326. Index. $8.50.

This is a book with a purpose, the purpose being to show that international law has come into being between nations for the same reasons that law within the nations has come into being: because of the individuals composing each and every nation. Men and women come together because they are sociable beings; from their association society exists without conscious formation, law making its appearance in order to control their actions, to secure their rights, and to redress the wrongs which may be done them. It is a natural course of things, and the law is natural, in the sense that individuals could not live without it if they would, and, it may be added, that they would not if they could. There is no suggestion in this of a law-maker.

The process is a natural one, and the law, few in its principles, however many its rules, is the consequence of the natural process. These principles are much the same everywhere, because human beings are much the same,

and everywhere they wish protection of their rights, reparation for their wrongs, and an assurance that the given word shall be kept.

As the needs of a community suggest other and new rules, they come into being. They are made by the people, although we may say by the State, as our understanding is that it is not the State, but the people residing within boundaries, who make the approved rules which may be called laws.

The above statements are of the reviewer, more by way of introduction than an express statement of what Dr. Lauterpacht says. They are in place as showing that necessary rules arise with social necessity, without being created by the State, for Dr. Lauterpacht would have us understand that the State is not the creator of law, nor as such, the judge of morality, and that to restrict law to the so-called positive law made and imposed by the State, is incorrect in theory and dangerous in fact.

So much for what we would call municipal law.

Dr. Lauterpacht is equally sure that the State, as such, does not make international law; in other words, that the State does not make a rule of international law and impose it upon the other States; that while a State may determine within its municipal jurisdiction, or rather the citizens thereof, within their jurisdiction may make a rule for themselves, it does not have, nor can it have extraterritorial effect. Usages and customs between States as within States grow up, and the principles of justice expressed in rules of law within States are more or less in accord, inasmuch as they spring from the necessities of individuals making up the States; only those which are fitted to the relations of States as such, are either applied to the relations of States, or they are developed or modified in such a way as to be apt for this purpose. So sure is the learned author of this that he prefixes to his work a phrase from Grotius' *Mare Liberum:* "*. . . populi respectu totius generis humani privatorum locum obtinent.*" [Cap. V.] and follows it with a statement from the late Professor Holland, which is as a gloss upon the opinion of the lad Grotius, some twenty-one years of age when he wrote his *Commentary on the Law of Prize,* and but twenty-six when he published its twelfth chapter under the title of *Mare Liberum.* Professor Holland's statement is that "The Law of Nations is but private law 'writ large.' It is an application to political communities of those legal ideas which were originally applied to relations of individuals." [1]

This is believed to be a correct statement of the situation; and if anyone doubts it, or wants to see how it can be demonstrated, he will find it to perfection in Dr. Lauterpacht's *Private Law Sources and Analogies of International Law,* a great and abiding contribution to international justice.

Dr. Lauterpacht is an outspoken advocate of international arbitration, and of the judicial settlement of disputes between States. He subjects the Positivists to an unrelenting cross-examination to establish his contention;

[1] Thomas Erskine Holland, *Studies in International Law* (1898), p. 152.

and he says (at least in the opinion of this reviewer) that the Positivists are obliged to fall back on general principles, that is, natural law, when the positive rule has not been imposed. This, he rightly contends, is an express acknowledgment on their part, of the existence and binding effect of "non-positive" rules. Fortunately for us, he interrogates the nations, and proves by their treaties that they have submitted their disputes for the past century and more to temporary tribunals of arbitration, to be decided by the principles of justice and equity, generally recognized rules of law, etc. The meaning of this can only be that they recognized the existence of such principles, although they had not been imposed.

This is a hard nut for the Positivists to crack, but, to change the figure, he routes the Positivists by his treatment of Article 38 of the Statute of the Permanent Court of International Justice. Indeed, in his brief foreword to the volume, Mr. Arnold D. McNair states that the first of the "two things of real value" in Dr. Lauterpacht's volume is "a thorough exploration of the justification of that part of Article 38 of the Statute of the Permanent Court of International Justice which directs the Court to apply, amongst other rules, 'the general principles of law recognised by civilised nations.'" And the second of the "two things of real value" is, according to the same competent authority, "a mass of legal material from the awards and proceedings of international tribunals" establishing as a fact "that there is more international law in existence than is generally believed."

The reviewer would like, in his own behalf, to congratulate Dr. Lauterpacht upon his analysis of Article 38. He happens to know that the third category of law which the Court is to apply—"The general principles of law recognised by civilised nations"—was adopted for the express purpose of supplying a rule of decision, where international conventions and international custom did not exist, so that the Court could decide the dispute before it in the absence of conventional and customary law; and that, as Dr. Lauterpacht says in the second footnote to page 68, "The expression 'general principles of law recognised by civilised nations,'" is a mere substitute of the English-speaking members of the Advisory Committee of Jurists framing the Statute, for the term, "'legal conscience of civilised peoples' as proposed by the Chairman of the Committee."

The reviewer knows of no better defense of natural law than Dr. Lauterpacht's book. He knows of no better justification of this phase of the Permanent Court's jurisdiction. The future will, in the opinion of the reviewer, turn its back upon the Positivists and return frankly to "the reason of the thing," which is only another way of stating natural law. And it is also his opinion that international law can best be developed by monographs on special subjects, instead of elaborate treatises, and that Dr. Lauterpacht's volume is a model of what a monograph dealing with a question of international law should be.

JAMES BROWN SCOTT.

Where Freedom Falters. By the author of *The Pomp of Power.* New York: Charles Scribner's Sons, 1927. pp. xxiv, 391. $4.00.

This book is published anonymously, but the writer is identified when it is learned from the British *Who's Who* that *The Pomp of Power* appears among the titles of books written by Mr. Laurance Lyon. Mr. Lyon was born in Canada, but since his thirtieth year has lived in Paris and London. He was a member of Parliament from 1918 to 1921.

Between the first chapter, on "The American Constitution and its Makers, and the last, on "The Flight of Freedom," the author gives pungent expression to numerous opinions about men, conditions and tendencies in the United States and elsewhere. He thinks the American Republic has "outgrown its Constitution;" he decides that no definite American foreign policy exists except in the Monroe Doctrine, which is "moribund," and in a negative attitude with respect to the League of Nations. In the chapter on "The United States and Canada" the author remarks that "at present there is no annexation party in Canada and no threat of annexation from the United States," but he quotes from "an English weekly newspaper" the statement that while all the "nice" people in Canada favor the English connection, "in democracies it is not the nice but the nasty people who govern," and adds: "I entirely agree with the last statement" (p. 75). The author says little more about the present or future relations between Canada and the United States, but discusses at length the domestic policies and the personal characteristics of the Canadian Prime Minister, of whom he says: "He is not a man of any general intellectual attainments, nor has he any intellectual curiosity."

With equal bluntness the author comments on public men, living and dead, of England, France, Canada and the United States. He characterizes briefly the presidents, from Lincoln's immediate successor to Harding, and says: "If one considers these names in detail, the best that can be said is that democracy is easily satisfied," and pronounces the list a roll "largely composed of more or less uninteresting and vapid politicians." He calls a recently deceased Secretary of State "tawdry and superficial," and of a well-known senator, still living, he says that he "has passed his apex. It is generally recognized that he now typifies the things he might have done, as he once typified the things he was going to do."

A characteristic chapter is devoted to Colonel Edward M. House; another to the foreign debt settlements. Eighty pages are given to chapters on "England Today," and "The European Situation," after which the author returns to the United States and discusses "Prosperity and Civilization." He finds great riches in the United States and many good qualities in the people, but decides that the country "will produce no civilization equal to that of Europe for many a long day to come." A discussion of the multiplicity of our laws on a great variety of subjects, including prohibition, leads to the final chapter on "The Flight of Freedom."

Americans will find in this book much interesting and perhaps wholesome reading, and its bluntness will be much less irritating than might be anticipated. To the reviewer it seems that the author's opinions sometimes miss the mark entirely, often graze the edge of the truth, but seldom hit the target squarely in the center.

H. W. TEMPLE.

A History of European Diplomacy, 1914–1925. By R. B. Mowat. New York: Longmans, Green & Co., 1927. pp. viii, 343. $6.25.

There is nothing very colorful about this book; nor does it bring forward any important new ideas or facts. It contains, however, a rather careful and accurate enumeration of the main facts connected with the diplomacy of the World War, and the period since the war, and should furnish a satisfactory text book for use in certain college courses. It will also be useful for a concise and rather elementary reference book in the field which it covers.

This book is more complete for the period following the war than for the war period. There is practically no discussion of the causes leading up to the war or of the, at present, much mooted question as to who was responsible for the war. The author, however, does discuss at some length the question as to how far the treaty obligations of Great Britain bound her to come to the defense of Belgium and France. His final conclusion on this subject is indicated by the following sentence: "As therefore the existence of the Entente did make certain a more or less speedy coöperation of Great Britain and France, it is a great pity that a formal alliance was not made and published in the years before the War." Many will agree with this view. The author admits that "the Entente Powers, still hopelessly winding themselves in the silken web of the Constantinople spider," were badly deceived by the diplomacy of the Turks, but avoids all reference to how much more badly they were deceived, a little later, by the diplomacy of the Bulgarians.

Mr. Mowat is evidently one of those who attach great importance to the Treaties of Locarno, which he describes as "the first successful step taken to solve the tremendous problems of European security, after five years of failure." These treaties have always seemed more valuable in the minds of the English than in those of any other race, and the author here is merely stating the orthodox English attitude. The author admits that the French Government was much less satisfied with the result than was the British Government, and that the former, "had all through these negotiations maintained that the security of France depended not only upon her position in the Rhineland, but upon her system of alliances in Eastern Europe." English diplomacy has always been troubled with a peculiar kind of near-sightedness which has prevented her from seeing very clearly either conditions or dangers in the Near East.

ALBERT H. PUTNEY.

The Russian Imperial Conspiracy, 1892–1914. By Robert L. Owen. New York: Albert and Charles Boni, 1927. pp. 212. $2.00.

The author of this interesting brochure is a former United States Senator who, during his term of service, became a recognized authority in the field of fiscal administration. In 1917 he stanchly supported the policy of President Wilson and was in no sense identified with that little band of "wilful men" who stubbornly held out against presidential leadership with reference to a break with Germany. In a recent number of the *American Mercury*, C. Hartley Grattan gives a graphic description of the war-time hysteria that seized upon American historians after the entry of the United States into the World War. Such an extreme attitude caused certain misgivings in the mind of Senator Owen, and his conversion to the so-called "revisionist school" of World War historians was made complete when by chance he opened the revealing volumes of *Livre Noir*. The experience of Senator Owen upon reading the secret despatches contained in *Livre Noir* was much like that of John Keats upon looking into Chapman's *Homer*. At once a new world swam into the Senator's ken, a world of amazing international intrigue that gave new orientation to his thought. Now it was apparent that "the Germans did not will the war." The conflict was "forced on them by the Russian Imperialists—Grand Duke Nicholas, Isvolski, Sazonoff, Sukhomlinoff, and associates in control of Russia." Many centuries ago, Robert Burton, in his famous *Anatomy of Melancholy*, descanted at length upon the potent effect of certain books upon individual readers; I am inclined to add *Livre Noir* to his list.

In the opinion of Senator Owen, these despatches in *Livre Noir* "showed that the theory that the war was waged in defence of American ideals was untrue." Those who were wont to believe that the World War was but a prelude to a new order of Democracy, that it was but a manifestation of an ever increasing purpose that through the ages has worked toward its final accomplishment, a Parliament of Man, such individuals were living in a fool's paradise. The war was really devoid of any saving quality, and it was brought on by "the most gigantic conspiracy of all time" in which "Isvolski was the evil genius chiefly responsible." The object was "the control of Constantinople and the Dardanelles, over-lordship in the Balkans and the seizure of German and Austrian territory." In his well-known speech delivered in the Senate, December 18, 1923, Senator Owen sketched the outlines of his present work and distinctly indicated his own belief in the dual responsibility of Isvolski and Poincaré. His interpretation of evidence won the praise of Professor Fay and the acceptance of Professor Barnes. And these were not all. Some months previous, Baron Korff, in a review in the *American Historical Review* (July, 1923, pp. 747–48) gave evidence of a similar reaction after reading volume one of *Livre Noir*. His conclusion was that "the reader will put aside this volume with the inevitable conviction that Poincaré long before 1914 had one idea in his mind, the war with Germany."

In a review of the more extensive Stieve collection of Isvolski despatches, Professor Langer (*New Republic*, April 15, 1925, pt. II, pp. 13–14) echoes much the same sentiments as those expressed by Baron Korff. It is apparent that Senator Owen's interpretation of evidence is not altogether individual. Many historians will believe that Senator Owen has overestimated the importance of *Livre Noir* as a key to World War responsibility. Others will refuse to regard those interesting volumes as a new *Sartor Resartus* that strips the alleged "entente legend" of any covering of truth. To the revisionist school this new study of Senator Owen's will appear as a skillful restatement of pertinent evidence.

CHARLES C. TANSILL.

El Tratado de Paz con España (*Archivo Histórico Diplomático Mexicano*, num. 22). Edited, with introduction, by Antonio de la Peña y Reyes. Mexico: Secretaría de Relaciones Exteriores, 1927. pp. xxix, 222.

The Spanish Government was very loath to recognize the independence of its former colonies in the New World. Their independence actually had been achieved by 1825, and in some instances much earlier; but notwithstanding almost continuous pressure from England and the United States, Spain did not recognize this *de facto* situation until much later, and even then very reluctantly. Mexico was the first of the new states to be so acknowledged. The present volume contains the documents dealing with the negotiations which led to the final settlement. They center around the treaty of peace eventually signed on December 28, 1836, and ratified more than a year later. The main difficulties confronted by the negotiators related to the questions of indemnity to Spain and certain commercial concessions as the price of recognition. The final treaty granted the latter to a limited extent, but withheld the former. It also contained a pledge, on the part of the Mexican Government, not to encourage or countenance the instigation on its national soil of plans menacing the security of Spain's possession of Cuba. It marked an important era in Hispanic-American diplomacy, being followed by the gradual extension of recognition to the other Spanish states of America and, more recently, by the development of the Pan-Hispanic Movement.

The introduction contains an interesting sketch of the political services of Don Miguel Santa María, the Mexican diplomat who took part in the negotiations. The volume is an excellent piece of printing and editing, and the series of which it is a part is now becoming an important and indispensable source for the study of Mexican diplomacy. In less than three years 22 small volumes have appeared, and we hope that the work will continue with equal speed and thoroughness.

J. FRED RIPPY.

The Diplomatic Quarter in Peking. By M. J. Pergament. Peking: China Booksellers Ltd., 1927. pp. 133. $3.50 (Mex.).

This monograph is a criticism of the "Protocols of the Meetings of the Diplomatic Body" in Peking from October 26, 1900, to May 31, 1920. The meetings numbered 219. Professor Pergament, as legal adviser to the Soviet Embassy at Peking, had access to the unpublished protocols, and his brochure is a useful addition to the limited materials available on the character of the legation quarter and the jurisdiction and functioning of the diplomatic body.

The author's method of handling his material is unscientific. He makes no attempt to exhaust it, but confines himself to the selection of incidents that present the corps in an unfavorable light. For example, Article VII of the Boxer Protocol, which reads, "in which Chinese shall not have the right to reside," is read as "prohibiting Chinese from living within the Diplomatic Quarter" (p. 43), and upon the author's interpretation an argument in criticism of the practice of permitting such residence is erected. The author's argument also is lacking in completeness of data and in clarity. He devotes a chapter to unanimity of decisions, a practice which he decries, in which his choice of important incidents is limited to three, one of which was decided unanimously. The other two involved the status of enemy aliens in the Mixed Court at Shanghai and that of their legation properties in Peking. On these issues the single minority voice was that of the Dutch minister, who had been entrusted with the protection of German and Austrian interests. The author's selection of incidents illustrates the difficulty of applying the rule of unanimous decision, but fails to evidence the practicability of majority rule.

Chapter VII, on the right of asylum, is well argued from the standpoint of one who denies that such a right exists, either for the legations separately or for the diplomatic quarter, under international law or treaty. Professor Pergament might have, but apparently had not, anticipated how promptly the Diplomatic Body and Marshal Chang Tso-lin would find use for his argument. Chapter VIII, on the content of the term "use of the legations" in the Protocol of 1901, seeks to establish that the term does not contemplate the exercise of sovereignty. He cites no decision of the Diplomatic Body to the contrary, but quotes certain chiefs of mission in assertions of sovereign power in the quarter. His argument in a portion of this chapter neglects the distinction between sovereignty and extraterritoriality.

M. Pergament concludes by urging the abolition of the diplomatic quarter "with its haughty aspect of an alien, unsociable, shunning and privileged entity" (p. 133).

HAROLD S. QUIGLEY.

The Monroe Doctrine, 1823–1826. By Dexter Perkins. Cambridge: (Harvard Historical Studies 29) Harvard University Press, 1927. pp. xi, 280. Index. $3.50.

Written primarily for the student of diplomatic history, Dr. Dexter Perkins' study of the Monroe Doctrine answers a useful purpose. Dr. Albert Bushnell Hart's earlier "Interpretation," and the more recent official expositions of our "elder statesmen," Messrs. Root and Hughes, were addressed to a more general public. Moreover, the continuing value of our great national dogma depends upon just such intelligent "reinterpretations" as the present work, made in the spirit of the moment and in the light of new historical experience. With the broadening of our foreign contacts since the World War, the United States has assumed a position more nearly comparable to that obtaining when the famous doctrine was formulated than at any other period of our existence. Until 1917, foreign relations occupied a secondary place during a century of internal development. The key to our more recent attitude regarding "concerted action" with the Powers of the Old World is to be found, in a careful study of the period of the Holy Alliance which formed the background of the Monroe message.

Unlike many of its commentators, Dr. Perkins carefully distinguishes between the dual aspects of the doctrine. Without entering into the somewhat sterile discussion regarding the "authorship" of the message of 1823, the contributions of both Adams and Monroe are judged in the light of contemporary opinion, and as the author believes "it is well that fuller credit be given the President." Monroe was apparently not much concerned about the Russian problem, underlying the famous "non-colonization clause." It may be held with equal truth that Adams' interests were somewhat removed from South America, where the doctrine was to have its fullest development and application. A further distinct contribution is made to the history of the Adams doctrine when Dr. Perkins points out that "the territorial aspects of colonization were not uppermost in his mind. . . . He was thinking . . . primarily of the commercial interests of the United States." Colonial systems at that time were synonymous with commercial exclusion. For this reason Adams had long vigorously opposed the narrow policy of Great Britain in the West Indies. In this respect he was the first proponent of the great American diplomatic principle of the "Open Door." In his writings Adams seems to postulate that "the powers of Europe were debarred from making new settlements by the claim of the United States as derived under their title from Spain." This pretension is dismissed by Dr. Perkins in the following words:

> "The reasoning, then, by which it was sought to sustain the Adams doctrine must be pronounced fallacious. It rested on one of two propositions, each equally indefensible—on the notion that exclusive rights in the northwest had been acquired from Spain, or on the theory that the

> whole surface of the American continents was occupied by independent civilized nations. Both were untenable from the standpoint of the facts and of International law, and both must be unhesitatingly rejected."

While the author criticizes Adams' reasoning from the standpoint of international law, he finds nothing but praise for the *policy* that motivated this declaration. The Adams doctrine, as embodied in the President's message, was "worded extremely judiciously from the standpoint of the diplomat."

While not so original in treatment as the study he presents of the so-called Adams clause, Dr. Perkins' chapters devoted to the "South American Phase" of the message are marked by the same careful attention to the latest historical special studies. Reviewing recent authorities, he comes to the conclusion that Monroe's attitude was the result of "a fellow feeling in a struggle for liberty" in contrast to the "pressure of commercial classes" that lay behind the proposals made by Canning to Minister Rush. The President's manifesto of 1823 carried out a policy initiated as early as 1811 while he was Secretary of State. These earlier intentions, interrupted by the War of 1812 and the Florida Treaty, were renewed by Monroe with the help of Clay early in his own administration.

While doubting the authenticity of the so-called "Pact of Verona," to which some authorities have attached importance, he recognizes the fact that European politics at the close of the Napoleonic Wars "were characterized by the efforts of the Tsar Alexander to found a World Alliance." This idealogue attempt to regulate not only European but also American public order (with all the implications that such "concerted action" has with respect to the American attitude of isolation at the present day), is treated in a chapter on "The Warning to Europe." Beginning with the Tsar's admonitions of August, 1825, respecting the "benevolent intentions of the Allied Powers," he develops the reasons which determined Monroe to oppose the Holy League. In order "to guarantee the tranquillity of all the states of which the civilized world is composed," the Powers were preparing a "forcible interposition" against revolution in the southern continent of America. The President's belief "that the European and American political systems should be kept as separate and distinct from each other as possible," enjoyed the support of Adams, although, as Dr. Perkins remarks, "sympathy with a Republican South America sits with better grace upon Monroe."

The chapters dealing with "What Europe Intended," "The Reception of the Message," and its "Aftermath," all deserve a more extended notice than the limits of this review permit. It is to be hoped that the promise held forth by the title of Dr. Perkins' book, that a series of monographs is contemplated dealing with the ensuing critical periods in the history of our great national doctrine, will be realized at an early date.

W. P. Cresson.

Répertoire général des Traités et autres acts diplomatiques conclus depuis 1895 jusqu'en 1920. Publié avec le concours financier du Legatum Visserianum de Leyde. Harlem: H. D. Tjeenk Willink & Fils; La Haye: Martinus Nijhoff, 1926. pp. xix, 516. 18 fl. (Institut intermédiaire international.)

This indexical volume is in continuation of the *répertoires* of Tétot and of the De Ribiers, father and son, the three publications constituting a finding list of treaties concluded from 1493 up to January 10, 1920. The volume was prepared by the *Institut intermédiaire international* of The Hague, which so admirably lives up to its subtitle of an "*office permanent de documentation juridique internationale.*" The *Répertoire* ends where the department of the Institute's *Bulletin*, "*Aperçu des rapports conventionnels internationaux*," begins. As a consequence, these four reference sets afford a progressive finding list for the treaty engagements of the entire modern age.

The present volume is an index to 144 international and national treaty collections, reviews and compilations. Arranged chronologically, it records the date, parties, subject, place of signature, exchange of ratifications and references to the published texts of 4,412 treaties. The purpose has been to make the volume as complete as possible, and to that end use has been made of the official journals of states and the records of international conferences. The chronological list is supplemented by a table, alphabetical by states, of all bilateral acts recorded, a separate table of multilateral conventions, and a further index by subject. Everything has been done to make the volume an efficient reference work, including satisfactory typographical arrangement.

A volume of this kind affords an opportunity to estimate quantitative progress. It notices 4,407 treaties concluded in the years 1895–1919. The Catalogue of Treaties, 1814–1918, issued from the Government Printing Office in 1919, records 2,190 from 1895 until November 11, 1918. During the 25 full years from 1895 to 1919, the *Répertoire* shows an average of 169.5 treaties annually; but in the 10 years 1903–12 a total of 2,288 treaties are recorded, an annual average of 228.8. Treaties registered at Geneva for publication in the League of Nations Treaty Series from July 5, 1920, through June, 1927, numbered 1,490, an annual average of 212.5. It appears, then, that the world's annual treaty production now amounts to, say, 210 units annually.

In the preface it is pointed out that the duration of treaties listed is beyond the scope of the *Répertoire*, but that such information can be had on application to the *Institut*. With the *Répertoire* in the library and such service available, there seems to remain little excuse for any scholar not being fully informed as to the treaty engagements underlying any international problem.

DENYS P. MYERS.

Die Verbindlichkeit der Beschlüsse des Völkerbundes. By Dr. Dietrich Schindler. Zurich: Orell Füssli, 1927. pp. iv, 90. Fr. 3; M. 2.40.

Professor Schindler has presented us with a closely-reasoned pamphlet upon the binding character of votes and resolutions of the Council and the Assembly of the League of Nations. The author seeks to distinguish resolutions which, by their nature and under the provisions of the organic law of the League, may be binding upon the individual member-states, and those which are merely political recommendations. He suggests that the whole purpose of the League seems at first inquiry to be a negation of any strictly legal interpretation of the provisions of the Covenant. The members of the Drafting Commission would doubtless resent the author's statement (p. 3) that its provisions were purposely left vague and blurred. On the other hand, one can readily adopt the characterization of Larnaude that its structure is "*plus politique que juridique,*" and also that of Judge Max Huber as a "*Kodifikation der praktischen Politik*" (p. 3). The author concludes from Article 5 of the Covenant, and inferentially also from Article 26, that resolutions of the Council and the Assembly may become binding without ratification by the member-states. Not all such resolutions possess a legally binding character, because some, by their very nature, are properly to be considered as recommendations; and it is the principal purpose of the author to classify the two categories according to the various functions of the Council and Assembly.

The discussion involves a wide field of interpretation concerning which no one can yet assume to speak authoritatively. Indeed the author himself points out that there is no procedure mentioned in the Covenant for any final interpretation. The Hague Court had occasion to say in its advisory opinion respecting Jaworzina (No. 8, p. 37), "it is an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it." The author applies this dictum quite literally, from which he concludes that the authoritative interpretation of the Covenant would then rest with its amendatory procedure under Article 26 (p. 59).

The author has undertaken a fruitful study of the League from a new angle of great importance in international law and his discussion should serve to stimulate further investigation along parallel lines.

ARTHUR K. KUHN.

Die Entscheidungen des Internationalen Schiedsgerichts zur Auslegung des Dawes-Plans. Erste Session (März, 1926), Teil I: Sozialversicherung in Elsass-Lothringen und Polnisch-Oberschlesien; Zweite Session (Januar, 1927): Entschädigung wegen der Beschlagnahme und Liquidation deutschen Eigentums. Deutsch herausgegeben von Dr. Magdalene Schoch. Berlin: Dr. Walther Rothschild, 1927. pp. xiv, 222, and xii, 267.

(Politische Wissenschaft: Schriftenreihe der Deutschen Hochschule für Politik in Berlin und des Instituts für Auswärtige Politik in Hamburg, Heft 2, Heft 4.)

As was related editorially in this JOURNAL at the time when the first decisions of the Dawes Plan Tribunal were printed (this JOURNAL, Vol. XX, No. 3, July, 1926, p. 566), the putting into effect of the Dawes Plan for the liquidation of German obligations to the Allied and Associated Powers on account of reparations, as stated in the Treaty of Versailles, in 1924, was accompanied by an agreement between Germany and the Reparation Commission whereby there was constituted a tribunal of five arbitrators, the president of which was to be, and has been, a citizen of the United States, whose function it should be to settle disputes between the Commission and Germany concerning the interpretation of the Plan itself. This tribunal, whose nature and functions were so admirably explained to the American professors visiting the Dutch capital in the summer of 1926 by its distinguished Secretary, Mr. E. N. Van Kleffens, has now rendered several decisions. Certain of these awards have been printed in these pages (this JOURNAL, as already cited; also Vol. XXI, No. 2, April, 1927, p. 344), but they are, in general, very difficult to obtain in this country. Three such awards are here published, together with copious extracts from other documentary materials leading up to the awards themselves and historical and explanatory introductions and a critical evaluation of the awards by the editor. The documentary materials include chiefly the written and oral pleadings before the tribunal, accompanied by certain exhibits of evidence in support thereof. The awards in the matter of pensions in Alsace-Lorraine and Silesia, and one or two other matters, are to be treated in Part III of this series.

The reader is impressed with two general considerations at the outset. One is the general effect of the action of 1924 in substituting technical for political treatment of the many subissues involved in the reparations problem. We are dealing here with financial and administrative questions of the utmost difficulty. Without the Dawes Plan the "problem of the inclusive amounts" might well have been made a football of international politics. And the second consideration lies in the way in which these financial and economic questions have now been handed over for legalistic treatment to the tribunal. Not what needs to be done, but what the agreements of 1924 really say should be done, is what the tribunal tries to discover, in view of its mandate. Now the first transfer—from political to technical methods of treatment—was clearly a gain; given reparations obligations in general, it was well to have the execution of those obligations planned by financiers and business executives. It would not be so clear that the second step also was a gain if the members of the tribunal should become mere legal dialecticians in their work, as they might be tempted to do.

In point of fact, while denying their own power to alter the arrangements of 1924, as they logically must, the tribunal at several points comes close to

reopening the problems before it and deciding them on their merits. Within the limits of the agreements made in London in that year there is still room for some process of perfectionment, not to say revision, of the now famous Plan. Thus in one award the Plan is construed to cover German obligations not arising from the Treaty of Versailles or, indeed, from the World War at all, and to cover states not party to its terms. That process, it may be hoped, will continue; this tribunal may on some future day, not far distant now, be called on to save the Dawes Plan by wise "interpretation."

As for the general juristic value of these decisions, one may be permitted to remain skeptical. The conditions of the problems submitted to the tribunal are too highly peculiar to recur frequently in history. One boldly adds: at least it is to be hoped that they will not.

The German editor very naturally waxed enthusiastic regarding the awards of 1926, which held that German payments on account of social insurance funds in Alsace-Lorraine and Polish Upper Silesia were to be included in reckoning German reparation payments. The tribunal was an organ of human justice and right. The award of January, 1927, which refused to count as reparation payments the payments made by Germany in Germany to German owners of property abroad which they had lost as a result of confiscation by Allied Governments, provokes protracted criticism on her part, however. To the reviewer the awards seem equally sound, but the individual student must pass upon that for himself, of course.

To the editor and publishers all students of contemporary international problems should be grateful for these publications. In general the books are published in excellent form, although there were binder's mistakes in the copy of Part II (at pp. 172 and 176) used for review.

PITMAN B. POTTER.

Effets de la dissolution de l'Autriche-Hongrie sur la nationalité de ses ressortissants. By Ivan B. Soubbotitch. Paris: Rousseau & Cie., 1926. pp. 315. Fr. 55.

This very successful attempt to unravel some of the complications to which the dissolution of the Austro-Hungarian Monarchy has given rise is divided into four parts: an introduction, a description of the authoritative instruments, a critical examination of their effects, and, lastly, a short, final summary of conclusions.

The Introduction explains the prior Austro-Hungarian law of nationality and discusses the facts of the disruption. Here Dr. Soubbotitch assumes, we think, a fundamental fact which ought to have been proved: that the Monarchy was a "Real" union, and not a federal or a unitary state, that the sole link of union was the fact that the sovereign was the same person, and that Austria and Hungary were both international states, members of the family of nations. This is not the place to discuss the matter, but surely independent diplomatic representation, or at least some formal intimation to

foreign Powers, is essential to confer on a community the character of an international state. Prior to 1867, it can hardly be denied that "Austria" was looked upon abroad as a unitary realm. The constitutional privileges conferred upon Hungary at that date, disputable as their effect was, could not impose on an ignorant world outside, the necessity of treating Hungary as a new independent state, united to Austria solely by that golden link, Francis Joseph. We do not argue the question, but it is clearly fundamental. For us, neither "Austria," in the narrow sense, nor "Hungary" was any more an international state than South Dakota. The author, himself (p. 276), speaks of "*la grande puissance qu'était l'Autriche-Hongrie.*" Mayerhofer (1895), and Hernritt (1909), are also of this way of thinking; and the author can only refute them by citing the Austrian and Hungarian laws. It is strange that he does not see that the point is one of international law, not of Austrian law at all. Although the substance of the Allies' Peace Treaties seems to recognize that Austria and Hungary existed as international states, although in union, their language is directly contrary to such a supposition. They speak of "the territories of the former Austro-Hungarian Monarchy," clearly implying that it was an international person possessing territories as a single whole. The author is on firmer ground in denying that the Constitution of Hungary was a truly Federal one, in which Croatia played the part of a confederated state along with Hungary proper. The attributes of the local legislatures were so narrow (comparable to those of the South African provinces), that federalism here passed beyond the vanishing point.

It is a consequence of the author's doctrine that the end of the war did not put an end to a state; it only dissolved the union between Austria and Hungary, leaving them both subsisting. Hungary, no doubt, would accept this point of view, and it was highly convenient to the Allies; but the jurist must consider it radically false. Why a revolution in Innsbruck should be any differently regarded from a revolution in Prague is not apparent. The mere fact that the former common capital city (Vienna) was involved in the former case cannot affect the situation. We know that changes of government do not affect a state, and we know that changes of its territory do not affect a government. But when there is continuity neither in the government nor in the territory governed, it is undeniable that a new state has arisen, bound in general by none of the obligations of the old one. *De minimis non curat lex;* and one need not go so far as to say that a slight change in the territory it can command would prevent a revolutionary government from being the true successor of that which it disestablishes. But the territory of the Austrian Republic is far from being approximately that of the Austro-Hungarian Empire or even of the Austrian part of it.

Regarding the birth of the Succession States, Dr. Soubbotitch maintains the doctrine that recognition has nothing to do with the matter. "*La reconnaissance est un acte d'État à État: de l'État reconnaissant à l'État*

reconnu." Elle est declarative et non pas constitutive. Ce n'est pas par la reconnaissance mais par un fait qu'un êtat vient au monde." This could not be better said, and may help to scotch a heresy. The facts of the disruption are set forth with simplicity and clarity. There is no reason why the new Austrian Republic should have been held by the Allies to be the successor of the old Austrian Empire any more than Bohemia, except Allied animosity and the childish reason that it bore the same name. Had it styled itself "The Viennese Republic," or the "Tyrolese Republic," or the "Carniola-Carinthian Republic," perhaps the scapegoat might really have escaped. In fact, it is between the devil and the deep sea. It has to bear the Empire's burdens, but Serbia and Roumania annex the Empire's population of the Jugo-Slav race within their territories.

Dr. Soubbotitch's book raises in an acute form the question of the multiple meaning of the term "nationality." In its international sense, it must mean the whole of the population owing personal allegiance or subjection to the sovereign, whatever their political rights. In its municipal sense, it is a most ambiguous term: it may mean persons to whom a special status of participation in the government is reserved; it may mean the persons whom the state, rightly or wrongly, claims as personally subject to its sway; it may exclude the people of colonial "protectorates;" it may include or exclude persons (*e.g.*, residents abroad) who have no actual share in political rights; it may mean mixtures of all these elements. A respectable critic of the present reviewer, discussing the imaginary "nationality" of corporations, actually defined "nationality" as "subjection to a given system of law," which is precisely what he had to prove. This ambiguity is not wholly avoided in Dr. Soubbotitch's book. In particular he fails to realize that, in the interpretation of the peace treaties, "nationality" must have its single or international sense. The treaties, contrary to his opinion, seem to us decisive as to nationality, whatever the legislation of the individual Powers may enact. Nationality, in short, is an international thing, and has nothing to do with citizenship or *droits de la cité*.

Dr. Soubbotitch refuses to the Bosnians, since the annexation of 1908, any nationality at all. But clearly he means "nationality" in its restricted sense, in which it means, not subjection to a sovereign power, but the possession of constitutional rights within that power. A Russian under the Czar was nonetheless of Russian nationality because he had no political rights. The "nationality" so carefully parcelled out by the Austrian and Hungarian laws, of which Dr. Soubbotitch makes so much, is a purely municipal "nationality." Its refusal to Bosnians did not make them any the less Austro-Hungarians in the eye of international law, which cannot be affected by interior legislation. The thesis, indeed, of the mutual independence of Austria and Hungary is really exploded by the annexation of Bosnia. How could two Powers effect a joint annexation without regulating the nationality of the population? Without such regulation, the nationality would

be that of both annexing Powers—an unworkable supposition. And, in fact, the treaty with Turkey of 1909 stipulated simply that the nationality of the Bosnians should be that of "subjects of the Emperor and King." There is no support here of two nationalities for them, unless we look very hard for it.

In the part devoted to the Sources, their history is minutely and carefully detailed in a short compass, and all the relevant passages are quoted in full, here or in the Annexes. Passing to the exposition of their System, the peculiar Austro-Bavarian institution of *indigenat* (corresponding to the "settlement" of English parochial law, and well worth detailed comparison with it), is exhibited as the pivot of the nationality provisions of the treaties, and is discussed with great learning and fulness. It is a matter of municipal law. In the same part, the author treats with care and impartiality such questions as are raised by the rights of option, the possibility of *heimathlosat* and double nationality, the conflict between the treaties for the protection of minorities and the treaties of St. Germain and Trianon. His power of analysis and of clearly stating a problem is remarkable, even if we do not find his solutions invariably cogent. In his final conclusions he sustains with acumen the thesis that a cession of territory is not necessarily a cession of the population. Surely, however, unless expressly excluded, a cession of the population is implied, and in the rare case of a definitive conquest, unconfirmed by treaty, of a parcel of territory, it must be unnecessary. The author's idea that the consent of the former sovereign is a necessary thing is closely bound up with his doctrine, plainly erroneous as we regard it, that nationality is a matter of municipal law, to be settled by each state for itself.

Although professedly dealing with the topic of nationality only, Dr. Soubbotitch's book cannot fail to be of great service in the investigation of all questions connected with the break-up of the old Empire.

TH. BATY.

Derecho Internacional Público y Privado. By José Ma. Trías de Bes. Madrid: Editorial Reus, 1926. pp. 366. 12 pesetas.

If the aspirants to the technical public services of Spain master thoroughly such a compendium as Señor Trías de Bes, of the University of Barcelona, has written for public and private international law, they will have accomplished a good deal; and if this work is a sample of these compendiums, surely there is a very high standard of admission to the Spanish service. For this is a great deal more than a book to be crammed for an examination. It is a well considered, scholarly, and, in some respects, original contribution to the literature of international law. The author divides his work about equally between public and private international law. In the first part comparatively little space is given to the historical development of the subject or to a consideration of the traditional fundamental rights of states and

of the rights and duties derived from them. Instead, he envisages the international juristic community largely as embodied in the League of Nations. With two prefatory sections ("themes") on international administrative law, he devotes five to the organization and functions of the League and of the International Court of Justice. Particular attention is given to the status of the Holy See (Theme 4). Fitting into the general scheme of the work is a consideration of the peculiar situation of Spain, especially as to Morocco (Themes 24 and 25). Relatively little space is given to the law of war and but one short chapter to neutrality.

The second half is devoted to private international law, which the author defines (p. 185) as "that body of law by which is recognized and regulated the effectiveness of the municipal law of each state in the community or society of all." The legislation of Spain is emphasized in the various topics treated. The accuracy of these observations may be presumed. There is an evident misunderstanding of federal and state powers in the United States, however, in the statements (pp. 190 and 259) that "in the United States the alien may not acquire real property." The federal statute which is cited is in force as to the District of Columbia and later statutes as to the territories. One omission appears strange: there is no treatment of extradition. The volume will be of especial value in an American library where information is wanted and not easily accessible concerning Spanish legislation on subjects embraced within private international law.

JESSE S. REEVES.

Derecho Internacional Público. By Alberto Ulloa. Lima: Sanmartí y Cía, 1926. Tomo I, pp. 231.

This volume by Professor Ulloa, of the University of Lima, is principally concerned with the introductory portion of public international law, what is generally known as international jurisprudence. International law is in effect the result of an equilibrium between the interests of societies and moral sentiments expressed through public opinion. The consent of the state is not a cause or an origin of international rules, but a consequence of the pressure of interests and sentiments, an effect of factors which the State does not control. If by law is understood a rule of action, then international law exists. There is only one international law, which is not, however, applied to all human collectivities in the same form, only rules of a humanitarian character being of universal application, while those of juridical character continue to be exclusively for those peoples living in an international legal community. Custom, whose tacit acceptance results in quasi-contract, and treaties, the greater number of which do not form international law but are derived from it, are the principal sources of international law.

Professor Ulloa traces the historical evolution of international law and evaluates its status, taking a rather strong stand against codification at the

present time. He denies the existence of an American international law, without minimizing the importance of American contributions to international law. The subjects or persons of international law are entities which have personality and can manifest it directly in international relations. As such the author lists states, the Papacy, man, and recognized belligerents. An international state is a political community which in a determined territory lives a separate existence under its own regular authority and determined conditions of civilization. States have certain fundamental rights, which are relative rather than absolute: the rights of conservation, independence (which is no more than the right of separate political life), and equality. These rights, the point of departure for the whole international juridical system, are based not in natural law but in international realities, giving states which are the primordial subjects of international law sufficient capacity to exercise it and be responsible for its violation.

Professor Ulloa considers that man as part of a political collectivity, as a subject of a state, is an indirect subject of international law, but as a human being, as a member of the species and of society, he is a direct subject of international law, which protects his human and individual rights, the rights of liberty of opinion, physical conservation, individual liberty, mobility, option of nationality, and protection of the law. The nationality of each individual being established, the state to which he belongs assumes the protection of his rights by necessity of the legal order, although these rights are not derived from the state but are independent.

Part III is concerned with jurisdiction over land, water, and air-space. On the whole the treatment is sound. Conquest, however, is confused with title by cession made under duress.

Professor Ulloa makes ample use of historical and current illustration in developing his subject. While some of his points of view are novel and not generally acquiesced in, this introductory volume is, on the whole, stimulating and suggestive. There is no preface to indicate the exact scope of the work proposed, but as this volume is numbered I, others may be expected to follow.

LAVERNE BURCHFIELD.

Tratado de Derecho Diplomático. Dr. Ginés Vidal y Saura. Biblioteca Jurídica de Autores Españoles y Extranjeros, Vol. XCI. Madrid: Editorial Reus, 1925. pp. 576. 16.50 pesetas.

For some time there has been developing as a separate branch of international law, what the author calls Diplomatic Law, a name also adopted by other writers, and which serves as a title to the chairs for professing the subject.

It is interesting to determine the relation which exists between Diplomatic Law and its source, International Law. Another branch of the latter, the one pertaining to Consular Law, has already been organized separately, due

to the nature of the relations between States, and had ascribed to it all that concerns commercial intercourse and allied matters, while the conduct of political relations is left to the diplomatic officials. Thus two different branches of International Law, as applied to the relations between States, would appear quite distinctive the one from the other: Diplomatic Law and Consular Law.

Doctor Ginés Vidal y Saura defines diplomacy as being *the application of intelligence and activity to the conduct of relations between the Governments of constituted States*, and, in a stricter sense, as *the organ of which Governments avail themselves for the exercise of their foreign relations.* Some writers seem to see a relationship between Diplomatic Law and the Law of Nations, such as exists between the Civil or Penal Procedure Laws and Civil and Penal Laws; Dr. Vidal y Saura expresses a different opinion when he says that "the relation of Diplomatic Law to International Law is the same as between Administrative Law and Political or Constitutional Law." Within the field of comparison, neither one nor the other appraisal appears to be completely borne out. Let us consider, for a moment, International Law as tantamount to Civil Law. Diplomatic Law would represent a branch embracing not only diplomatic practices, namely Procedural Law, but also the different duties and powers of the officials, namely a Judiciary Code, besides the international agreements on the matter and the legal and regulatory provisions enacted by each country for its foreign service, that is, Administrative Law.

Embracing in its entirety the idea of Diplomatic Law, Dr. Vidal y Saura has divided his treatise into two parts, one dealing with general principles and the other pertaining to the diplomatic mission. After the two interesting chapters which serve as an introduction, the first part points out the officials who have a part in the conduct of foreign relations: the Chief of State, the Minister of Foreign Affairs, the officials of the Foreign Office and, finally, the diplomatic agents. These groups comprise almost all the individuals who have to deal with foreign affairs. Recently there has arisen a new class of officials,—delegates to international congresses and conferences. They are vested with the diplomatic character although their activities assume a special significance due to the fact that they are accredited to an international entity different from the State, but endowed with life of its own since it requires no special convocation by any government, such as the League of Nations and, eventually, the Pan American Union. After enumerating the channels of diplomacy and the matters comprised in Diplomatic Law, the author devotes the remaining chapters of the first part to a study of precedence, diplomatic forms, ceremonial and etiquette, and the consular branch.

In the second part, devoted to the Diplomatic Mission, he first delves into the historical development of the right of embassy, with an interesting array of data. The second chapter is an important study of the development of

diplomacy, and the third contains a highly useful classification of diplomatic agents. Following in logical sequence he refers, in Chapter XIV, to the beginning of the diplomatic mission, and in the chapters intervening up to Chapter XX, which deals with the close of the diplomatic mission, he covers everything pertaining to the juridical content of the mission, diplomatic immunities and prerogatives, the diplomatic corps and congresses and conferences. He devotes a special chapter to diplomatic compacts, treaties, conventions, protocols, etc., the forms in which they are concluded, their fulfillment and termination, data which may be very usefully consulted. He closes his book with an excellent study of the juridical progress in the international field up to the present day. Finally, the volume contains in an Appendix the standing Spanish Laws and Regulations for the Diplomatic Service.

Doctor Vidal y Saura has succeeded in his purpose of contributing to the study of the principles and usages of modern diplomacy as expressed in the subtitle of his treatise on diplomatic law; he has even gone further, by gathering in a volume, not only a review of the law itself, but also an abundant compilation of ancient and modern practices which increase the merits of his work and make very pleasant reading. The mere fact of its acceptance in the editions of the Biblioteca Jurídica is an indication of the merits of the treatise and enhances the reputation of its author. May I be allowed to add that Doctor Vidal y Saura's contribution should be in every library and made easily available for consultation with regard to the incidents which daily arise in diplomatic life, concerning which the author sets forth an impartial and lofty doctrine, backed by distinguished precedents. It is especially useful to the Latin American countries because of the clear and pure use which the author makes of the beautiful Spanish language.

MIGUEL CRUCHAGA.

Das Genfer Protokoll betr. die friedliche Erledigung internationaler Streitigkeiten. By Dr. Hans Wehberg. Berlin: Georg Stilke. 1927. pp. 189. Index. Rm. 5.

We owe to the author of this book thirty-three other useful writings on international subjects which have been published since 1909. (They are listed on pp. 188–189 of this one). "The Geneva Protocol" was written for and delivered to the Academy of International Law at The Hague, in the Summer of 1925, and has been published in a French version in Vol. 7 of the Academy's *Recueil des Cours*, as well as in its German original. In its present form it is sponsored by the German *Liga für Völkerbund*, being No. 24 of the league's supplementary publications. It has been awarded, also, the prize of the Chelcicky Peace Society of Prague.

The preface (pp. 5–8) contains a brief comparison between the Geneva Protocol and the Locarno Pact, which differ from each other in some par-

ticulars, but which are regarded as being in the relationship of parent and child, or of principle and application. The Locarno Pact, indeed, is regarded as only the first step in the series which the author anticipates will be taken towards the Geneva Protocol's goal of a general agreement upon which will rest the complete security and disarmament of the nations. Herein, our author thinks, lies the importance of the protocol: it is not a failure of the past, but a standard for the future. He accords a high place of honor, therefore, to the Fifth (1924) Assembly of the League of Nations, which made this vastly important contribution to the development of international government.

He concedes that it did not spring, fully formed, from the brains of the Fifth Assembly, under the leadership of Ramsay Macdonald and M. Herriot, but finds that it had three precursors. These were the Hague Conferences of 1899 and 1907, the Bryan Treaties of 1913, and the Covenant of the League of Nations of 1919. The epoch (*Zeitalter*) of the Hague Conferences is discussed (pp. 14–21), with the conclusion that it did a great thing in developing voluntary arbitration, but failed to provide for obligatory arbitration, the enforcement of agreements, and disarmament. The Bryan Treaties are dismissed in two sentences (p. 18), but are heralded as the first great practical attempt to create an organ of obligatory arbitration—their failure being attributed to the outbreak of the World War. The Covenant of the League of Nations provided an organ for the enforcement of agreements, and made some progress in developing obligatory arbitration; but it did not bring all disputes within the scope of obligatory arbitration (thus outlawing all war), nor did it solve the problem of armaments.

The Geneva Protocol, our author thinks, was the next great "turning-point" (*Wendepunkt*) and, had it gone into force, it would have provided peaceful settlement for *all* disputes, and made it possible for an international conference (which was provided for by it) to solve the armaments problem. In the development of the protocol, a half-dozen important contributions to the discussion are cited (pp. 23–36), and these served to stress the difficulties which had to be overcome, even though they did not ensure their annihilation.

The various chapters give a clear and careful analysis of the protocol itself, and helpful comments on the significance of its various parts. An American reader is naturally interested in the rôle assigned to the United States in relation to the future triumph of the protocol; but regarding this, the author is politely or mistakenly reticent. Aside from the historic part played by Bryan, Wilson and "the Shotwell Committee," small mention is made of things American. Although the United States is recognized as one of "the most important champions of obligatory arbitration," it is reproached for having "characteristically" neglected to negotiate a treaty of an unconditionally obligatory character (pp. 16–17). On the other hand, credit is given to American initiative in furthering partial disarmament (pp. 149–

150); and, since disarmament is regarded by the author as the *sine qua non* of peace and security, America's international rôle is not negligible.

How the "sanctions" of the protocol can be applied in face of neutral, especially American, opposition to blockades, Dr. Wehberg does not explain; but he evidently shares the European obsession that if the international "police force" can be made sufficiently powerful, while at the same time national forces are minimized, opposition to it, both within and outside the League of Nations, will be but as dust in the balance.

WILLIAM I. HULL.

Law of the Air. By Carl Zollmann. Milwaukee: The Bruce Publishing Co., 1927. pp. 286. Index. $5.00.

The book proper consists of six chapters, the first three of which, as the author states in his preface, closely correspond to three articles originally published in the American Law Review in the fall and early winter of 1919. Under the title Airspace Rights, the author comments on the relation of the World War to aeronautics, touches on Fauchilles' pre-war doctrine "The air must be free," and shows how that slogan was forced to succumb to the general acceptance of the existence of a national sovereignty over air space superincumbent upon what had hitherto been considered the physical limits of national domain. Throughout a considerable portion of this chapter the well-known maxim of the common law, *Cujus est solum ejus est usque ad coelum*, is made the subject of comment. The author reaches the sensible conclusion that the maxim should be reasonably construed; and referring to Dr. A. K. Kuhn's article in this JOURNAL, "Beginnings of an Aërial Law" (Vol 4, p. 109), asserts that the maxim "is one for the better enjoyment of the *land* and refers to air space only so far as it is *appurtenant* to land."

The two following chapters are entitled Governmental Control, and Damage Liability. After pointing out that it is elementary that the Federal Government is one of delegated powers, the author asks "where can a delegation of powers over the air be looked for in an instrument drafted before the air was available for human travel?" and concludes that in the absence of a constitutional amendment the Federal Government cannot take complete control of the air space superincumbent upon the terrestrial limits of the several States. In connection with the general subject of the interstate commerce clause, the writer, while taking the ground that the direct control of the air space is vested in the individual States as far as property rights and police regulations are concerned, asserts that "the regulation of aeronautics should ultimately be vested largely, or even exclusively, in the Federal Government, and the authority remaining in the several States should be so limited that its exercise will not seriously interfere with the development of aeronautics." The theory of the existence of State control over commerce conducted in that atmospheric "channel" of intercourse between States to which State lines are unknown—that aerial ocean overlying every inch of

the Federal domain and over-lapping the border lines of every State in the Union, which like the sea can be used by man only for the transmission of persons or things—does not appear to be fully developed by the author.

For the present, and until aircraft shall have become more safe and common than they are today, the author feels that the doctrine of absolute liability of the aeronaut for damages to property suffered by land owners, or for damages to the person, resulting from the use of such aircraft, announced in the old New York case of Guille *v.* Swan, will be followed; although his personal view is that "the smoothly gliding aeroplane on its unobstructed roadbed of air is no more a dangerous piece of machinery than is the deadly automobile on the highly congested thoroughfare."

There follow three chapters on Insurance, Patent Rights and Radio, covering in all some 50 pages, of which 32 are devoted to radio, concerning which the author states that since Gutenberg's printing press "there has been no single invention touching human interest and human welfare so closely as radio, the miracle of the present age." The Radio Act of 1927 is discussed at some length.

The text of this work covers 132 pages, not quite half the contents of the volume. The appendices, of which there are six, consist of the International Air Navigation Convention of 1919, the Air Commerce Act of 1926, Air Commerce Regulations, the Radio Act of 1927, the Uniform State Law of Aeronautics (adopted at the time of publication of Mr. Zollmann's book by Hawaii and by nine or perhaps ten States of the Union), and Federal Radio Orders issued by the Federal Radio Commission.

The book is interesting and furnishes material for instructive study. That it is of restricted scope is due in large part to the absence of judicial precedent; and in part to the fact that the author, as he states in his preface, felt that his work should be limited to the subject matter of transportation and communication through the air.

C. L. Bouvé.

BOOK NOTES

Rechtsfälle aus dem Völkerrecht. By Dr. Karl Strupp. Berlin: Julius Springer, 1927. pp. 77. Rm. 3.60.

Dr. Strupp has collected 150 cases in international law which he presents in compact form for the use of students. This he does without giving the names of states or parties and without the citation of the texts of law or treaty which might be controlling. It is for the student to supply the authorities by research. While the problems are strictly legal, they are not necessarily those which would be directed to a judicial tribunal. Frequently the answers sought are only to arrive at correct diplomatic action and sometimes to select the proper form of procedure within the functions of the League of Nations. The author has added a supplement containing

an opinion upon a submitted question of international law, an abstract of the problems involved in the case of King Ferdinand of Bulgaria before the English Court of Chancery (1921, 1 Ch. 107) and the advisory opinion given by the Hague Court relating to the exchange of Greek and Turkish populations. The book presents a novel and interesting modification of the case-book system as pursued in American law schools and gives further evidence of the originality of thought and method characteristic of this scholar and teacher.

A. K. K.

Neues Völkerrecht auf Grund des Versailler Vertrages (Berlin: Ferd. Dümmlers, 1927, pp. 36. Rm. 2.50), by Heinrich Pohl, Professor of Law at Tübingen, is more a complaint against the burdens laid upon Germany by the Treaty of Versailles than it is a study of newly established international law. The title is therefore somewhat misleading. The author charges President Wilson with having broken the letter and spirit of his policies announced before the armistice. He alleges that the League of Nations has introduced a supposed right of intervention fraught with danger to international peace. Neither does the author concede any progress even in the establishment of the Permanent Court of International Justice. The author regards it to be only the court of the League—of which, one might add, his own country is now a responsible and influential member.

Der Rechtscharakter des Völkerbundes (Göttingen: Universitäts-Buchdruckerei, 1927, pp. 75), by Friederich Oskar von Unruh, is a doctoral dissertation in which the author analyzes the origin, organization and functions of the League from the point of view of pure legal theory. He examines the modern theories of association and discusses the effect of the Covenant upon established conceptions of sovereignty and the equality of states. He analyzes the separate functions of the League, executive, legislative, judicial and administrative, and finds that so far as legal structure is concerned, the League is, and was intended to constitute, only a "torso."

Dr. Hans Wehberg's *Die Völkerbundsatzung gemeinverständlich erläutert* (Berlin: Hensel & Co., 1927, pp. 160. Rm. 3), reviewed in this JOURNAL, Vol. 21, p. 647, has appeared in a second, somewhat enlarged edition.

Nation und Staat. Deutsche Zeitschrift für das Europäische Minoritätenproblem (Wilhelm Brandmüller, Vienna), the first number of which appeared in September, 1927, is a periodical devoted to the study of minority rights. "Nation" is used as distinguishing a group rather than a political entity. The problems presented by the existence of racial, religious and linguistic groups throughout the states of Europe and the solution of the problems which these involve, are considered by the editors as factors which will

determine the fate of Europe. The editors propose to combat the notion that nation and state must tend to coincide. They believe that methods of compromise must be found in order to permit different groups, more or less coherent, to exist harmoniously within the state. The staff collaborators are Jacob Bleyer, Rudolf Brandisch, Paul Schiemann and Johannes Schmidt-Wodder. With a platform so broad and an appeal so extensive, it seems regrettable that the publisher has set up the periodical in gothic type, long discarded by many scientific publications in Austria, Germany, and Switzerland.

REVIEW OF CURRENT PERIODICALS

By Charles G. Fenwick

Journal du Droit International, January–February, 1927

Le droit conventionnel envisagé comme source du Droit International Privé en France, by Etienne Bartin (pp. 5–33), argues that treaties dealing with the conflict of laws are, in France, "national sources" similar in their effect to statutes and administrative regulations and to custom. Considerable discussion is given over to questions arising from the interpretation of such treaties by the national courts, and the position is taken that not only are these courts the proper interpreters of the treaties, but in their interpretation they are to be guided by the analogous provisions of national law rather than by the intention of the parties to the treaty. (Query: is international law "part of the law of the land" in France in the same sense in which it is in Great Britain and the United States?) *La clause "paiement or" et les règlements extérieures*, by M. Picard (pp. 34–44), criticizes a recent decree of the *Cour de Paris* declaring null and void the clause calling for payment in gold by French policy holders to foreign insurance companies having local agencies in France, whereas in the writer's judgment it should not have been the place of the payment but the nature of the contract that should have determined its validity. *La récente réforme hellénique sur la nationalité*, by C. G. Tenekides (pp. 45–51), summarizes the Greek law of September 15, 1926, which, among other things, provides that a Greek woman who marries a foreigner only loses her nationality in case she acquires that of her husband, thus putting an end to the condition of "statelessness" (*apatridie*) resulting from the application of the American law of 1922 and Art. 104 of the Russian Soviet code. *Les Conferences maritimes en 1925–1926*, by G. Ripert (pp. 57–62), summarizes the results of the Brussels and Genoa conferences and of the action of the Labor Bureau at Geneva and of the International Law Association at Vienna.

Ibid., March–April, 1927. *La loi sur l'exportation des capitaux et la validité des marchés à terme sur marchandises passés par des Français sur des Bourses étrangères*, by André-Prudhomme (pp. 281–294), deals with recent decisions of different French courts passing upon the effect of the law of April 3, 1918, in cases where persons in France took advantage of the restrictions upon the export of capital to evade the obligations of contracts for future delivery made on foreign exchanges, the price of the goods contracted for having fallen before the time for payment. The writer criticizes sharply the position taken that the law in question could have the effect of nullifying such contracts and points out the disastrous effects which it would have upon French credit on the exchanges. *La Législation des loyers d'habitation et les étrangers*, by J. Perroud (pp. 295–306), raises the question as

to how far the law of April 1, 1926, regulating the rents of houses and apartments is applicable to alien owners or lessees. In pointing out the contradictions in the administration of the law the writer discusses incidentally the conflicts which it raises with treaty provisions. *Les jugements des tribunaux arbitraux mixtes et le Plan Dawes*, by J. C. Witenberg (pp. 307–318), argues that the adoption of the Dawes Plan, while modifying the provisions of Art. 233 of the Treaty of Versailles, did not and could not have the effect of modifying the provisions of Arts. 297 and 304 with respect to the rights of individual citizens of the Allied and Associated Powers to obtain compensation for injuries to property and interests in German territory by suit before one or other of the Mixed Arbitral Tribunals. *La réforme agraire et les intérêts privés hongrois en Transylvanie*, by R. Brunet (pp. 319–345), analyzes in great detail the recent decision of the Roumanian-Hungarian Mixed Arbitral Tribunal in the case of Emeric Kulin *v.* Roumania and shows that the court, by taking into account the principles of general international law in its interpretation of the provisions of the Treaty of Trianon, and by holding that the agrarian reform laws came within the "measures of liquidation" contemplated by the treaty, has settled definitely and equitably a very difficult problem. Comparison is made with the decision of the Permanent Court of International Justice in the case of the property rights of Germans in Upper Silesia.

Ibid., May–June, 1927. *Principes de competence pour les procès entre étrangers*, by J. Perroud (pp. 561–571), undertakes to show that in addition to the absolute and relative competence (jurisdiction) known to the French code of civil procedure there is also an "international competence" the rules of which in a suit between aliens take precedence over those of relative competence. (Query: can the decision of the civil tribunal of Lille holding that "in a conflict between a rule of international law and a rule of internal [national] law priority is given to the rule of international law" be accepted as "an incontestable principle," as the writer proclaims it to be?) *La condition des étrangers dans la République des Soviets* (pp. 572–581), surveys briefly the rules of law applicable to aliens in Russia in respect to freedom of travel and residence, public duties, civil capacity, property rights, copyrights and patents, contracts, commerce, family rights, and succession. *Aperçu sur la situation juridique des étrangers en Pologne*, by L. Babinski (pp. 582–594), points out the laws holding over from former governments and discusses their provisions in respect to access to the courts, the conflict of laws, commercial intercourse, property rights, taxes, social legislation, and domicile. *La loi française d'extradition du 10 mars 1927*, by M. Travers (pp. 595–613), deals with a law, incidentally passed 136 years after its first proposal by the Constituent Assembly in 1791, which is applicable where there are no treaty provisions governing the subject. What if a subsequent treaty should run counter to the present law? In such case the law would give way. The writer takes exception to the sweeping exemptions made in

favor of "political" criminals, but thinks that on the whole the new law is in advance of earlier practice at home and abroad. *La nationalité de la femme marié et la loi belge du 4 Août 1926*, by M. T. Nisot (pp. 611–613), discusses briefly an amendment of the earlier law of May 15, 1922. *Divorce et séparation de corps des étrangers domiciliés en Suisse*, by C. Simond (pp. 614–622), shows the circumstances under which the Swiss courts will take jurisdiction and the law applicable to the case.

REVUE DE DROIT INTERNATIONAL, January, February, March, 1927

In the opening pages of the first issue of this new publication, the editors, MM. A. de Lapradelle and N. Politis, sum up the reasons which justify its existence. International law is entering upon a new development; old principles, long accepted, are giving way before the changed conditions; the international community is passing out of its unorganized state and the new organization is building up a law of peace which tends to eliminate the rules of war from legal categories; economics, finance, and ethics have become auxiliary studies to international law; diplomatic documents are increasing in number and importance; and the theory of international law is losing its local and taking on an international character. Scientific methods must be applied to the widening field of international relations and constructive ideas be offered for the solution of the problems before us. *Sainte-Alliance et Societé des Nations*, by J. J. Chevallier (pp. 9–40), offered as a study in "diplomatic history," is rather a brilliantly executed contrast between the old diplomacy and the new democratic idealism expressed in the League of Nations. *Les Maîtres qui disparaissent*, by A. de Lapradelle (pp. 41–56), is a sympathetic study of the ideals of Antoine Pillet and his work in the field of international law. *Les transformations du droit international*, by N. Politis (pp. 57–75), shows the changes that have come about in the conception of the "sovereignty" of states, in the "principle of equality," in the legal character of the rights and duties of states, and in the very foundation of international law itself. International law has "become like other forms of law. It constitutes for states the same basis of equality which already exists between citizens of the state. It makes it possible for the community of nations to attain the essential end of every society, namely, the maintenance of order, peace, and justice." *L'Arrêt N° 7 de la Cour permanente*, by G. Gidel (pp. 76–132), examines in minute detail the decision of the Permanent Court of International Justice on May 25, 1926, with respect to certain German interests in Polish Upper Silesia, jurisdiction over which was taken by the court in its decision on August 25, 1925. The conclusion of the writer is that the decision "will have very beneficial results both for the development of the science of international law and for the strengthening or the reëstablishing of international morality. *La codification internationale du droit des eaux territoriales*, by H. S. Fraser (pp. 133–142),

argues that in view of the desirability of an agreement upon the subject and in view of the favorable reception accorded to the questionnaire submitted by the League of Nations Committee of Experts, the Council of the League should call a general conference of the nations to proceed with codification.

Ibid., April, May, June, 1927. *La dette de guerre des Etats-Unis à la France* (1777–1783), by C. Fliniaux (pp. 269–300), considers the circumstances attending the making and repayment of the American debt and draws comparisons with respect to the present French debt. *L'Elaboration des clauses économiques du Traité de Lausanne*, by M. Ogier (pp. 301–341), after a detailed analysis of the negotiations attending the treaty, shows how the rule finally adopted by the Allies with Turkey, namely, reciprocal restitution of property, without indemnity for losses, differed from that applied to the allies of Turkey in the earlier treaties. *L'Ecole autrichienne et le fondement du droit des gens*, by B. Akzin (pp. 342–372), undertakes an analysis of the Austrian school of legal theory founded by Kelsen. The dual basis, at once philosophical and juridical, of the system is examined, and the contrast is drawn out between Kelsen's "normative" theory of law as a sovereign obligation and Duguit's conception of social realities as the determining factor of law. *Les traités d'arbitrage*, by A. Raestad (pp. 373–415), is an original contribution on the nature of arbitration in its relation to the sovereignty of the state and in respect to the principles of "equity" which may be resorted to for the decision of questions not governed by strict rules of law. The discussion is preceded by an historical survey and followed by a study of the new provisions in the arbitration treaties between Norway and Sweden, Denmark and Finland. *Nouveaux domaines d'activité de la Société des Nations*, by V. Pella (pp. 416–421), discusses briefly the possible unification of the work of peace societies and the creation of an international penal law. *Les idées du Professeur Burckhardt sur le droit des gens*, by G. Chklaver (pp. 422–433), analyzes that writer's *Organization der Rechtsgemeinschaft*. *Les concessions en Turquie*, by J. Teyssaire (pp. 434–439), summarizes the execution of the provisions of the Treaty of Lausanne with respect to the indemnification of companies for losses sustained during the war.*

Revue de Droit International, de Sciences Diplomatiques et Politiques, January–March, 1927

Zur Hypothesis vom Primat des Völkerrechts, by J. L. Kunz (pp. 3–15), calls attention to the "low level" upon which the science of international law remained until recently, points out the causes, and proceeds to analyze and criticize the new theories, particularly those of the Austrian school, which have been advanced within the past few years to explain the relation

* Note.—In addition to its leading articles, the new *Revue* contains the texts of documents (*e.g.*, the full report of the Economic Conference at Geneva, May, 1927), chronicle of international events, reviews of books, and summaries of magazine articles.

of international to national law and to "sovereignty." (In German.) *La VII^me^ Assemblée de la Société des Nations et la Réorganisation du Conseil*, by A. Sottile (pp. 16–34), discusses, *inter alia*, the problem of the equality of states and the feasibility of decisions of the Council by a two-thirds or three-fourths vote. *Nicht-Anerkannte Staaten und Regierungen vor dem Ständigen Internationalen Gerichtshofe*, by J. Spiropoulos (pp. 35–45), deals with the theoretical questions whether, and with what effects, the Permanent Court could take jurisdiction over cases involving unrecognized states and unrecognized governments.

Ibid., April–June, 1927. *The Central American Court of Justice*, by P. K. Walp (pp. 89–108), surveys the circumstances attending the establishment of the court and analyzes the cases submitted to it, particularly the last case involving the Bryan-Chamorro treaty. *La Codification du Droit International*, by L. De Montluc (pp. 109–121), contains some pointed comments upon the outlook for codification in the face of the divergent views of its advocates. *Les Eaux territoriales*, by B. de Magalhaes (pp. 122–135), comments upon the draft convention presented to the International Law Association by its Comité de la Neutralité at the Vienna meeting in 1926. Sharp criticism is directed against the proposal to fix a three-mile limit for the marginal sea.

Ibid., July–September, 1927. *Les antécédents de la doctrine de Monroe*, by J. B. Whitton (pp. 175–187), surveys the policy of isolation leading up to Monroe's message. *The Draft Convention for the Unification of Certain Rules relating to Conflict of Laws*, by A. Jacobi (pp. 188–208), after preliminary observations on the general problem, comments in detail upon the draft convention relating to the conflict of laws on contracts, prepared by a committee of the International Law Association and submitted to the association at its meeting in 1926. *Nationalité et Mariage*, by J. M. Peritch (pp. 207–214), discusses briefly the Cable Act of 1922 in the light of European theory and practice. *La identificatione o meno della "Societa delle Nationi" con la "Confederazione di Stati,"* by A. Rapisardi-Mirabelli (pp. 215–219), maintains that the League of Nations is an international union *sui generis*, not a federation nor a super-state nor a "universal" state. (In Italian.) *La Session de Lausanne de l'Institut de Droit International*, by L. de Montluc (pp. 220–223), gives a brief but graphic picture of the 1927 meeting.

Revue de Droit International et de Législation Comparée, Nos. 1–2, 1927

Les arrêts de competence du tribunal arbitral mixte roumano-hongrois, by C. Dupuis (pp. 1–22), after showing that the assumption of jurisdiction by the tribunal was inevitable under the Treaty of Trianon, suggests that the implications of the decision put Roumania in a somewhat delicate position as to the questions at issue. Roumania must prove that in applying

her agrarian reforms she had the right to go counter to "common international law. It will be hard for her to show such a right." *Antoine Pillet* (1857–1926), by J. P. Niboyet (pp. 23–32), is a beautifully phrased tribute to the departed master. *Le domaine maritime* (*1re partie*), by J. Hostie (pp. 33–57), examines anew the doctrine of the freedom of the seas, argues that the seas are not *res nullius* but *res communis*, and draws conclusions with regard to the development of maritime law in a new "positive" sense. (To be continued.) *L'évolution de la conciliation internationale*, by C. Gorge (pp. 58–106), continues the earlier installments from the point where the Covenant of the League was presented to the Swiss Federal Council and then takes up three groups of recent treaties entered into by Switzerland providing for conciliation in one or other of the classified forms. *Des tendences de la jurisprudence française et grecque en matière de cour forcé et les principes du droit international*, by C. G. Tenekides (pp. 107–122), deals with the delicate problems arising from legal tender and depreciated currency as they were met by French and Greek laws and judicial decisions. Criticism is directed against both the territorial theory, which makes the place of payment determine the money in which payment is to be made, and the "implied intention" theory, which implies the intention of the parties from facts outside their control. *Des eaux territoriales*, by F. T. Grey (pp. 123–144), reviews the practice of nations, past and present, in respect to territorial waters, deduces certain principles from that practice, and concludes by claiming a general sovereignty of the state over the sea to the distance necessary for its security and within the range of its control. The doctrine of *res nullius* is adopted, and the present more definite limits are regarded not as rules of law but as national self-imposed restrictions.

Ibid., No. 3, 1927. *Observations concernant les tendences de l'évolution du droit international de l'extradition*, by H. Kraus (pp. 161–181), criticizes the decision of the Committee of Experts not to include extradition upon the list of topics suitable for codification, and points out the present necessity of bilateral treaties embodying the new ideas in this field. *Le droit international de la navigation aérienne en temps de paix*, by F. De Visscher (pp. 182–214), points out the defects of the convention of 1919 and proceeds, on the basis of the resolutions adopted by the Institute of International Law at Madrid in 1911, to work out the principles of a more "liberal" code. *Le domaine maritime*, by J. Hostie (pp. 215–244), continues the study begun in the preceding number and takes up coastal waters, bays and gulfs and mouths of rivers. Noting all the variations of practice and theory the writer expresses the hope that codification may not have the effect of stereotyping outworn doctrines. *Notes sur la responsabilité internationale des Etats et la protection diplomatique d'après quelques documents récents*, by C. De Visscher (pp. 245–272), discusses the general principles of responsibility involved in the report of Judge Huber upon the British claim for indemnity from Spain for losses suffered by British residents in the Spanish zone in Morocco, and further

the question of the nationality of the claimant in cases of intervention by a foreign government to obtain redress.

Revue Générale de Droit International Public, January–February, 1927

Les affaires agraires des resortissants hongrois devant le tribunal mixte Roumano-hongrois, by A. Pillet (pp. 1–19), reproduces, by the courtesy of the secretary of the Roumanian-Hungarian Mixed Arbitration Tribunal, an opinion given by the late Professor of Law at Paris in favor of the Hungarian inhabitants in their protest before the tribunal against the Roumanian law of July 30, 1921. The writer argues that the law cannot be regarded as a reform measure adopted in the general interest of agriculture, but is rather a measure of indirect liquidation such as was expressly forbidden by the Treaty of Trianon. *La police en haute mer*, by M. Sibert (pp. 20–44), is a careful and documented study of the numerous international conventions regulating the policing of the high seas which approaches, though it falls short of, internationalization. Owing to the individualistic action of the several states, the procedure in such cases, particularly in respect to the definition and proof of criminal acts, is unsatisfactory, and the writer recommends both development of principles of law and regular recourse to the Permanent Court of International Justice. *L'isolement des Etats Unis. Principe caduc de la Doctrine de Monroe*, by J. B. Whitton (pp. 45–57), deals with the "third principle" of the Monroe Doctrine, namely, that of non-intervention by the United States in the affairs of Europe,—a rule which "rests upon the fiction of the isolation of the United States, an idea practicable, opportune and logical in 1823; impracticable, inopportune and illogical to-day." By maintaining the doctrine in theory at the present day when the facts are to the contrary, the writer holds, the United States is enjoying the privileges of its position without accepting the responsibilities of it. *L'immigration en France, depuis la guerre, de la main d'oeuvre étrangère*, by J. P. Palewski (pp. 58–84), describes the problems that have arisen in connection with the immigration of manual laborers into France since the war. The treaties recently entered into by France are examined, and the principles which they embody are shown to indicate a desire to establish an equality of status between alien and citizen. Difficulties have been experienced in the administration of the new laws due to conflicts of jurisdiction between the local courts and foreign consuls in cases of industrial disputes. Recommendations are made for improving the few defects of the present system.

Ibid., March-April, 1927. *L'organisation judiciaire de Tanger dans le régime international*, by R. G. Fitzgerald (pp. 145–170), examines in detail the Mixed Tribunal of Tangier set up by the Franco-British-Spanish agreement of December 18, 1923. Following a brief sketch of the earlier tribunal as a background and an analysis of the government of the inter-

national zone the writer discusses the composition of the court and its several jurisdictions and concludes with some critical observations leading to the improvement of the court. *L'autonomie du Canada et sa nouvelle situation internationale*, by P. Lavoie (pp. 171–209), shows the gradual growth of self-government in Canada through its several stages, explains the political effects of the participation of Canada in the World War, and reaches the conclusion that while Canada is completely autonomous with respect to the other members of the British Commonwealth of Nations, it is not yet a sovereign state in respect to other powers. *Les zônes étrangères en chine*, by M. Yoshitomi (pp. 210–237), after sketching the history of the creation of extraterritorial zones in China examines in turn the several national (exclusive) concessions in China, the collective concessions, the zone of the Manchurian railway, and the diplomatic quarter in Peking.

Ibid., May–June, 1927. *Conciliation, Arbitrage, et Réglement judiciaire d'après les traités recents de la Pologne*, by J. Makowski (pp. 273–308), analyzes the several methods resorted to for the settlement of international disputes and in the light of the practice of other nations takes up in detail the clauses of the recent Polish treaties, making comparisons and drawing contrasts. *L'Institut de droit international. Session de la Haye, 1925*, by F. Rey (pp. 309–320), summarizes the proceedings of the meeting.

Ibid., July–August. *L'arrêt du 10 janvier 1927 du T. A. M. Roumano-hongrois*, by G. Scelle (pp. 433–482), deals with the recent much-discussed decision of the Mixed Arbitration Tribunal, and, after a preliminary survey of the circumstances leading to the question of jurisdiction, analyzes the briefs submitted to the court and examines minutely the legal points at issue. In conclusion the writer points out the great importance of the decision with respect to the general principles recognized by it, whatever be the final decision upon the merits of the case. *La Conference économique internationale* (Geneva, May 4–23, 1927), by R. Picard (pp. 483–505), surveys the preparations for the conference, its composition, the problems presented to it, the points of view of the delegates, and the resolutions taken. *Le problème de l'autorité internationale d'après les principes du droit public chrétien, et les publicistes espagnols du XVI^e siècle*, by J. T. Delos (pp. 505–519), asserts that the rational philosophic principle upon which international law rests is a heritage from the Spanish publicists of the sixteenth century, notably Vitoria and Suarez, and through them from the great medieval Schoolmen. The stone which the builders of the seventeenth and eighteenth centuries rejected, the principle that the sovereignty of the state must be in subordination to a higher law, is now destined, it seems to the writer, to become the head of the corner.

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Un projet de Code de Droit international privé, by E. Audinet (pp. 1–17), discusses the draft code drawn up by Professor (Judge) Bustamante and

published in a French translation by P. Goulé in 1925. The guiding principles of the code are first considered, and after comment upon the wide scope given by the author to the conflict of laws, an examination is made of the three categories of laws which the modern theory of international private law recognizes, namely, personal laws which regulate the conduct of persons by reason of nationality or domicile, territorial laws which look to the protection of citizens and the maintenance of public order, and private or "optional" laws which govern the voluntary acts of individuals. *La forme des actes juridiques dans la législation espagnole au point de vue international*, by J. M. Trias de Bes (pp. 18–36), deals with the scope of Art. 11 of the Spanish Civil Code concerning the law governing the exterior form of decrees. The rule of *locus regit actum*, while in principle imperative, is shown to yield under certain circumstances to the Spanish law, as in the case of marriage formalities. *La situation juridique des étrangers en Russie des Soviets et le régime des concessions*, by P. Nesteroff (pp. 37–43), concludes a study begun in the previous issue of the *Revue* and shows the protection given to aliens in Russia under the system of concessions. The writer condemns the "Concessions Commissions" created by Russia in certain foreign capitals, as well as the "mixed societies" formed between the Soviet Government and foreign firms.

Ibid., No. 2, 1927. *Le Régime nouveau de l'extradition d'après la loi du 10 mars 1927*, by H. Donnedieu de Vabres (pp. 169–192), points out the three "phases" in the development of extradition and shows in detail the relation of the recent French law to earlier practice. *Conséquences juridiques de la reconnaissance du Gouvernement des Soviets par la France*, by J. Delehelle (pp. 193–239), is a very careful study of all phases of a situation the consequences of which the writer regards as of more importance to France than the Russian revolution itself. The immunities of the Soviet Government now recognized, the effect upon Franco-Russian treaties, questions of the conflict of laws, including marriage and nationality, the status of corporations formed before and after the Soviet régime, and the legal condition of Russian refugees are examined in turn.